ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2014-001959

IN THE MATTER OF THE CARE AND TREATMENT OF
DAQUAN JOHNSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The right to counsel in sexual predator cases is a statutory right, and assuming it requires effective assistance of counsel, ineffective assistance allegations should not be considered on direct appeal because committees under the SVPA can raise ineffective assistance of counsel through common law habeas corpus proceedings, which afford all parties, including trial counsel, an opportunity for the full evidentiary hearing necessary for appellate review, and the Strickland two part test should be used to assess the ineffective assistance claims. (Appellant's Issues 1, 2 and 8)

II. If appropriate for consideration on direct appeal, Appellant's allegations of ineffective assistance of counsel are premised on speculation, misstatements of the record, and appellate counsel's opinions regarding what trial counsel should have done, without benefit of trial counsel's input. (Appellant's Issues 3-7)

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On December 17, 2012, Appellant pled guilty to three counts of lewd act on a minor, arising from inappropriate sexual behavior over more than four years involving a five year old female, a ten year old female, and a thirteen year old male. The original charges were first degree criminal sexual conduct with a minor. He received concurrent sentences of fifteen years incarceration, suspended to time served (approximately eighteen months), and five years probation. Appellant's probation was revoked on April 12, 2013, and he was sent to the South Carolina Department of Corrections to serve six months of his original sentence. (Petition Pursuant to the Sexually Violent Predator Act filed July 1, 2013, with Exhibits [Petition], pp. 1-2, Petition Exhibits C and D; Record on Appeal [R.], pp. 290-291, 299-353, 354-357).

Prior to Appellant's release from incarceration, the State filed a Petition under the Sexually Violent Predator Act (SVPA) seeking Appellant's commitment for long term control, care and treatment as a sexually violent predator. (Petition and Exhibits; R., pp. 290-401). The circuit court found probable cause to believe Appellant is a sexually violent predator, and appointed Kimberly Harrison, Psy.D., to evaluate Appellant and render an opinion regarding whether he has a mental abnormality or personality disorder that makes him a risk to re-offend sexually if not confined for treatment. After Dr. Harrison concluded Appellant did not meet the statutory criteria for commitment, the State sought an independent evaluation from the Medical University of South Carolina (MUSC). William H. Burke, Ph.D, conducted an extensive evaluation, and concluded Appellant did meet the criteria for commitment.

The case was called for a jury trial on September 15, 2014, before the Honorable Alison Lee, Circuit Court Judge. Prior to trial, the State moved to exclude any testimony regarding the treatment Appellant would receive if committed under the SVPA, and indicated the State and Appellant's trial counsel agreed not to bring up that issue or anything regarding what would happen if Appellant was committed, such as annual reviews, during trial. (Trial Transcript [TT], pp. 6-7; R., pp. 6-7).

The State presented testimony from Dr. Burke, who was qualified as an expert in the field of assessing and evaluating sexual offenders under the SVPA. In evaluating Appellant, Dr. Burke followed the Association for the Treatment of Sex Abusers (ATSA) protocol for evaluating sex offenders, which is structured to provide as much information as possible for identifying the person's risk factors for reoffending, and is accepted by experts in the field of sex offender evaluation. As part of the protocol, Dr. Burke reviewed all available documents, used multiple screening and actuarial tools, and interviewed Appellant for three and one-half hours.. (TT, pp. 50-66; R., pp. 50-66).

Dr. Burke testified he reviewed documents regarding Appellant's offenses, his incarceration records, and his criminal history, all of which is the type of information typically and reasonably relied on by experts conducting sexually violent predator evaluations. He considered the factual allegations underlying each of the criminal charges, which included anal penetration, masturbation, oral sex, vaginal penetration, and exposing the victims to pornography. (TT, pp. 67-74; R., pp. 67-74).

The records also revealed Appellant was disciplined while incarcerated for intentionally masturbating in front of a female corrections officer, and then throwing the written citation at the officer. Dr. Burke testified this indicated a possible diagnosis of

exhibitionism, which if combined with pedophilia, increases the risk an offender will sexually reoffend against children. He further stated it demonstrated Appellant could not control his sexual conduct even under the strictest of supervision while incarcerated, which makes it more likely he will act out sexually if out in the community with no constraints. (TT, pp. 74-76; R., pp. 74-76).

During Dr. Burke's interview with Appellant, he asked Appellant for his version of the facts of his offenses. Appellant's "version of events for everything he was convicted of was that he was totally innocent and the he was following the advice of his attorney to accept pleas." Dr. Burke testified this was significant because his extensive experience indicated people who were in denial about their crimes have a higher reoffense rate. (TT, pp. 76-77; R., pp. 76-77).

Dr. Burke also found Appellant's mental health history significant because he had multiple prior diagnoses, including attention deficit hyperactivity disorder and bipolar disorder. The results of Dr. Burke's tests did not support an attention deficit disorder, but indicated the possibility of a bipolar disorder. Ultimately, Dr. Burke focused on whether Appellant has pedophilia, and possibly exhibitionism, but stated a significant mental health history could increase Appellant's risk to reoffend if he does not follow the treatment providers' recommendations to control his mental health issues.. (TT, pp. 77-79; R., pp. 77-79).

Dr. Burke then testified about the specific assessment tools he used during Appellant's evaluation, which included the Abel Assessment for Sexual Interest, Connors Continuous Performance Test, the Penile Plethysmograph (PPG), the Personality Assessment Inventory, the Substance Abuse Subtle Screening Inventory, the Mini-Mental

State Evaluation, the Static-99R, the Stable-2007, the Acute-2007, and the Hare Psychopathy Checklist. He stated these tools are part of the ATSA standard of care so the evaluator can address different facets of the person, including their sexual makeup, sexual interests, sexual arousal, mental state, and physiological problems. (TT, pp. 79-106; R., pp. 79-106).

Dr. Burke testified about the results of all the tests he used as they related to his ultimate conclusion. On the Static-99R, which is an actuarial based risk assessment tool, Appellant's original score was seven, which put him in the high risk category for reoffending. Based on additional information Dr. Burke received the day of trial, he adjusted Appellant's score to eight, which heightened his risk. Dr. Burke explained the entire scoring process for the Static-99R, and testified he believed it underestimated Appellant's risk because it only measures people who get caught and convicted for reoffending, and the research indicates the majority of sex crimes against children are not reported.. (TT, pp. 81-86; R., pp. 81-86).

Dr. Burke also testified in depth regarding the PPG, including its history and how it works. He candidly acknowledged problems with earlier versions of the PPG, and explained the improvements developed to address those problems. During Appellant's PPG, he responded very significantly (full arousal) to the category of consenting adult females, which was expected based on Appellant's statement he was heterosexual, but he responded just as significantly to a broad range of scenarios involving rape of a prepubescent female and rape of a prepubescent male. Dr. Burke testified the results indicated there was a larger potential victim pool, and this was important to his opinion

because two major studies found positive responses to children on a PPG is the best predictor of reoffending in child molesters. (TT, pp. 98-106; R., pp. 98-106).

Dr. Burke found several additional risk factors increasing Appellant's risk to reoffend, including his inability to control his sexual conduct while incarcerated, the loss of his mother while he was incarcerated, his lack of a realistic plan for what to do if he is released, his continuing denial of his crimes, and his lack of any sex offender treatment. He explained how each of these factors increased Appellant's risk to reoffend. (TT, pp. 106-109; R., pp. 106-109).

Dr. Burke diagnosed Appellant with pedophilia, non-exclusive mix, which is a relevant mental abnormality under the SVPA. He testified pedophilia can be controlled with proper treatment and supervision, but Appellant's continued denial regarding his crimes made him a poor candidate for treatment if released, and he needed to be confined for proper treatment until he is safe to be released in the community. (TT, pp. 109-115; R., pp. 109-115).

On cross-examination, Appellant challenged Dr. Burke's methodology and results. He specifically challenged Dr. Burke's scoring of the Static-99R, and his conclusion Appellant was a high risk to reoffend in light of low scores on the Acute 2007 and the Stable 2007. In addition, he had Dr. Burke reveal the technical reasons his probation was revoked, which he claims was because he did not have any place to live at the time, and the fact Appellant was in jail a significant period of time before he entered his guilty pleas in December 2013. (TT, pp. 115-159; R., pp. 115-159).

Appellant presented testimony from Dr. Harrison, who was qualified as an expert in forensic psychology, regarding her evaluation of Appellant and her conclusions. She

testified she reviewed all the records regarding Appellant's criminal offenses, school records, and Appellant's mental health records. She also interviewed Appellant, and scored the Static-99R. She agreed with the diagnosis of pedophilia, non-exclusive, but in her report she opined Appellant did not meet the criteria for commitment under the SVPA. She stated she could not render an opinion as of the date of trial because she had just learned about an additional charge against Appellant, and would have to do more research before she would offer an opinion.[1] (TT, pp. 186-208; R., pp.186-208).

On cross-examination, Dr. Harrison admitted the only risk assessment tool she used in evaluating Appellant was the Static-99R. She also admitted she found Appellant had several dynamic risk factors for reoffending, including resistance to rules, grievance hostility, and a history of lifestyle impulsiveness. Again, citing the "new" information, she refused to give an opinion regarding whether Appellant met the criteria for commitment. (TT, pp. 208-225; R., pp. 208-225).

The jury found beyond a reasonable doubt Appellant is a sexually violent predator. The circuit court denied Appellant's post-trial motions, and committed him to the South Carolina Department of Mental Health for long term control, care and treatment. (TT, pp. 286-288, Order of Commitment filed September 16, 2014, Form Order filed September 17, 2014; R., pp. 286-288, 386, 387-388). This appeal followed.

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[1] Significantly, the "new" information Dr. Harrison referenced was the same "new" information Dr. Burke received the first day of trial, but Dr. Burke was able to factor it into his analysis with no problem.

ARGUMENT

I. The right to counsel in sexual predator cases is a statutory right, and the statute does not provide a right to effective assistance of counsel, but if the Court finds such a right, ineffective assistance allegations should not be considered on direct appeal because committees under the SVPA can raise ineffective assistance of counsel through common law habeas corpus proceedings, which afford all parties, including trial counsel, an opportunity for the full evidentiary hearing necessary for appellate review, and the Strickland two part test should be used to assess the ineffective assistance claims. (Appellant's Issues 1, 2 and 7).

Appellant contends trial counsel was ineffective as a matter of law, and the alleged ineffectiveness should be determined in this direct appeal because the SVPA does not provide a mechanism to raise ineffective assistance of counsel issues, and he has no other available mechanism to raise the issues. Appellant concedes the specific issues he asserts as ineffective assistance of counsel are not preserved for appellate review, and such issues would not be decided on direct appeal, even in a death penalty case. In the face of those concessions, however, he asks this Court to ignore long standing issue preservation precedent, and essentially apply a plain error standard of review to decide the issues anyway, all without affording trial counsel an opportunity to be heard. Further, contrary to Appellant's contention, there **is** a well-established and available mechanism for him to raise ineffective assistance of counsel issues arising from a sexually violent predator case.

A. Effective Assistance of Counsel in SVPA Cases

Appellant argues, extensively, that in addition to the statutory right to counsel, there is a due process right to effective assistance of counsel in SVPA cases under the federal and state constitutions. This Court has already determined a person the State

seeks to commit under the SVPA has no Sixth or Fourteenth Amendment right to counsel, but does have a statutory right to counsel under S.C. Code Ann. § 44-48-90 (2003). In re McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 59 (2004)[2]; *see also* In re McCracken, 346 S.C. 87, 551 S.E.2d 235, 240 (2001) (the only right to counsel under the SVPA is the statutory right to the assistance of appointed counsel).

The primary issue, therefore, is whether the statutory right under the SVPA encompasses the right to "effective" assistance of counsel. The statute does not afford that right, normally arising from the Sixth, Fifth and Fourteenth Amendments, which do not apply to civil cases under the SVPA. In essence, Appellant is attempting to put a square peg in a round hole, and asks this Court to juxtapose post-conviction relief (PCR) rights and procedures on SVPA proceedings, minus the inconvenience of providing a record for meaningful appellate review.

If this Court holds the statutory right to counsel under the SVPA includes the right to effective assistance of counsel, however, the remaining issues are how such claims should be litigated, and what standard should be used to determine whether counsel was ineffective. Rather than force the square peg into a round hole, there is already a round hole available to Appellant, even though it may be inconvenient for him to use it.

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[2] Even though the Court specifically cites the Fourteenth Amendment in the McCoy opinion, by way of footnote, Appellant asserts the Fourteenth Amendment reference was dicta, and the constitutional issue was not before the Court. To the contrary, rather than mere dicta, the constitutional references in McCoy were central to the Court's adoption of a meritless appeal procedure in SVPA cases.

B. Availability of Relief

Appellant contends he has no avenue other than direct appeal to raise ineffective assistance of counsel allegations. On the contrary, if such a right exists, the common law habeas corpus petition provides an adequate, and more appropriate, forum for litigating such allegations.

The South Carolina Constitution provides the "privilege of the writ of habeas corpus shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it." S.C. Const., Art. 1, §18. Habeas corpus **is** available when other remedies, such as PCR, are inadequate or unavailable. Hamm v. State, 403 S.C. 461, 744 S.E.2d 503, 504 (2013); *see also* Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600, 602 (2008) ("a writ of habeas corpus is reserved for the very gravest of constitutional violations which, in the setting, constitute a denial of fundamental fairness shocking to the universal sense of justice"); McWee v. State, 357 S.C. 403, 593 S.E.2d 456, 457 (2004) (habeas relief will only be granted under "unique and compelling circumstances"); Butler v. State, 302 S.C. 466, 397 S.E.2d 87, 88 (1990) ("[N]ot every intervening decision, nor every constitutional error at trial will justify issuance of the writ.") (internal quotations and citations omitted). The PCR statute superseded habeas corpus for post-conviction relief, but the common law privilege still exists, and Appellant cites no cases to the contrary. As noted above, the SVPA does not provide a process for litigating ineffective assistance of appointed counsel, and therefore, if the Court holds the SVPA statutory right to counsel includes effective assistance of counsel, habeas corpus is available to address those issues.

In Hamm, a SVPTP resident filed a habeas petition in the South Carolina Supreme Court seeking release from his civil commitment under the SVPA, alleging counsel in his criminal case was ineffective under Padilla v. Kentucky, 559 U.S. 356 (2010), by failing to advise him of the SVPA implications before he pled guilty to the predicate SVPA offense.[3] The Court denied the petition, finding the resident failed to file a timely PCR petition on the issue, and therefore, failed to exhaust all available remedies before seeking habeas relief. Hamm at 504.

Significantly, the Court did **not** hold habeas relief was never available to a SVPTP resident, and as discussed above, precluding habeas relief would be contrary to the state constitution. To the contrary, the Court explicitly recognizes a SVPTP resident's right to file a habeas petition when appropriate. In re: McCracken, 346 S.C. 7, 551 S.E.2d 235, 238 (2001) (SVPTP resident's remedy for unconstitutional confinement under the SVPA would be by writ of habeas corpus).[4] *See also* Douglas v. Hall, 229 S.C. 550, 93 S.E.2d 891, 894 (1956) (writ of habeas corpus always available to test the legality of proceedings in which person was civilly committed on grounds of insanity).

Appellant correctly asserts the PCR statute and S.C. Code Ann. §17-17-10 (the habeas statute) are only available to people either convicted of a crime (PCR statute), or committed or detained for a crime (habeas statute), and he could not seek relief under those statutes because his current commitment/detention is not punishment for a criminal

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[3]In fact, multiple SVPTP residents have filed habeas petitions in the circuit court.

[4]Appellant's assertion the habeas right referenced in McCracken is "limited to challenging the conditions of their confinement" is simply incorrect. Nothing in the Court's opinion imposes such a limitation.

conviction, or other pending criminal charges. Nothing in either statute relates to civil cases, however, or trumps the constitutionally recognized common law right to petition for habeas relief if other remedies are unavailable. Rather, the PCR statute provides the functional equivalent of a habeas proceeding, and the habeas statute merely recognizes the right to seek habeas relief prior to conviction if detained on criminal charges.

Requiring a petition for habeas relief to assert ineffective assistance of counsel allegations avoids the problem of trying to decide such claims on the record in a direct appeal, a problem readily apparent in this case. A habeas proceeding would include an evidentiary hearing similar to PCR hearings, which affords trial counsel the opportunity to address the ineffective assistance of counsel allegations, and provides the appellate courts a full record, including the circuit court's findings and conclusions, for review purposes. Absent a full record, the appellate courts: 1) will not have the benefit of trial counsel's input, and have to assume counsel had no legitimate, strategic reasons for proceeding in a particular way; 2) will be forced toengage in rank speculation based on appellate counsel's assertions regarding what trial counsel should, or should not, have done; 3) must ignore issue preservation rules; and 4) will have to apply the plain error standard of review consistently rejected in South Carolina.

Appellant relies heavily on In re Ontiberos, 295 Kan. 10, 287 P.2d 855 (2012), arguing this Court should follow the Kansas Supreme Court's analysis of ineffective assistance of counsel claims in sexual predator cases because the SVPA was modeled on

the Kansas sexual predator statute.[5] There are significant aspects of the Ontiberos analysis impacting its applicability to South Carolina sexual predator cases.

A central basis for the Kansas court's right to counsel analysis in Ontiberos was the Kansas statute's provision that failure to comply with the statute's requirements, arguably including the statutory right to counsel, did not prevent the state from pursuing a sexual predator determination, which the court found diluted the statutory right to counsel and required a constitutional analysis. 287 P.2d at 863. South Carolina's SVPA has no such provision, and the statutory right to counsel is not diluted in any way.

Further, Kansas had a specific precedent regarding appellate court remand to the trial court for an evidentiary hearing on ineffective assistance of counsel claims raised on direct appeal, and the Kansas Court of Appeals had already remanded the case for an evidentiary hearing pursuant to that precedent. *Id.* at 865-866 (*citing* State v. Van Cleave, 239 Kan. 117, 716 P.2d 580 [1986]). The committee argued he could not file a habeas petition to raise his ineffective assistance of counsel claims, and the Court of Appeals did not have authority to remand the case on direct appeal for an evidentiary hearing on the allegations. The Kansas Supreme Court disagreed, finding the committee could file a habeas petition, but the remand was an appropriate exercise of discretion. *Id.* As a result, the appellate court had a full record in the committee's direct appeal on which to assess the ineffective assistance of counsel claims.

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[5] Appellant apparently equates "modeled on" with "indistinguishable." As discussed below, however, there is at least one clear distinction between the SVPA and the Kansas statute that goes to the heart of the Ontiberos analysis.

South Carolina appellate courts unquestionably have discretion to remand any case to the trial court for further proceedings, but unlike Kansas, there is no established precedent in South Carolina providing for remand **only** to develop issues raised for the first time on direct appeal when the party has another available avenue, such as habeas corpus, to raise those issues. Remanding under the circumstances of this case essentially eviscerates issue preservation and imposes a plain error standard of review, which appears to be Appellant's ultimate goal. *See* Brief of Appellant, p. 45 (asserting SVPA constitutionality problem compounded by "this Court's consistent refusal to adopt a plain error standard," and constitutional infirmity would be remedied "[i]f South Carolina used plain error review").

In Manning v. State, 913 So.2d 37 (1st Dist Fla. Ct. App., 2005), the court determined habeas corpus, rather than direct appeal, was the appropriate avenue to develop and decide a committee's ineffective assistance of counsel claims in cases under Florida's sexually violent predator statute, even though a habeas proceeding might not be the most convenient process. Subsequent to the Manning case, the Florida Supreme Court promulgated Rule 4.460, Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators, which expressly provides habeas corpus is an available mechanism to raise ineffective assistance of counsel claims in sexual predator cases. Bohner v. State, 157 So.3d 526, 527 (1st Dist. Fla. Ct. App., 2015).

Admittedly, as Appellant notes, some courts have decided ineffective assistance claims on direct appeal in sexual predator cases when the claims did not require development of facts, which is not the case currently before this Court. As discussed below, notwithstanding Appellant's conclusory proclamations regarding trial counsel's

deficiencies, all Appellant's allegations, with one notable exception, require development of facts before a court can render a truly informed decision on whether trial counsel was so ineffective it shocked the conscious, and Appellant was prejudiced to the point he could not receive a fair trial.

C. Appropriate Standard for Ineffective Assistance Analysis in SVPA Cases

Appellant concedes the vast majority of jurisdictions addressing the issue of ineffective assistance of counsel in civil commitment cases use the two part analysis established in Strickland v. Washington, 466 U.S. 668 (1984) (to warrant reversal based on ineffective assistance of counsel, defendant must show both deficient performance and resulting prejudice). He argues Strickland imposes an "unreasonably" low standard for counsel's performance and an onerous burden to show ineffective assistance. He further argues the "denial of fundamental fairness shocking to the universal sense of justice" habeas standard imposes a "nearly insurmountable legal standard" even more onerous than Strickland.[6] He asks this Court to adopt the ineffective assistance of counsel analysis espoused by the Montana Supreme Court in the civil (**not** sexual predator) commitment case of In Re: Mental Health of K.G.F., 306 Mont. 1, 29 P.3d 485 (2001).

In K.G.F., the court considered the right to counsel afforded by a state statute governing civil commitment of mentally ill individuals whose illness made them a danger to themselves r others.[7] No criminal act was required to trigger applicability of the

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[6]This contention reveals the real reason Appellant does not want to use the available habeas procedure.

[7]It appears the Montana statute at issue is similar to probate court proceedings in South Carolina.

statute, and the process was completed in two days. Looking to guidelines developed by a national advocacy group, the court espoused five "critical areas" to define the scope of effective representation in commitment cases, and held an involuntary commitment must be vacated "upon a **substantial showing of evidence** . . . that counsel did not effectively represent the patient-respondent's interest" in those areas. 29 P.3d at 498-501 (emphasis added).

Significantly, in Ontiberos, the case Appellant asserts should control in this case, the Kansas Supreme Court expressly **rejected** the K.G.F. analysis, and adopted the Strickland test for ineffective assistance of counsel claims in civil commitment proceedings under the Kansas sexual predator statute.

> Numerous other jurisdictions use Strickland for claims of ineffective assistance of counsel raised by persons committed under that state's sexually violent predator law. *See, e.g.,* Jenkins, 271 Va. at 16, 624 S.E.2d 453 (recognizing a constitutional right to effective counsel and evaluating the claim under Strickland); State of Texas for the Best Interest and Protection of H.W., 85 S.W.3d 348, 356 (Tex.App.2002) (same); People v. Rainey, 325 Ill.App.3d 573, 585–86, 259 Ill.Dec. 369, 758 N.E.2d 492 (2001) (recognizing statutory right to effective counsel and evaluating that claim under Strickland); In re Crane, 704 N.W.2d 437, 439 (Iowa 2005) (same); In re Alleged Mental Illness of Cordie, 372 N.W.2d 24, 29 (Minn.App.1985) (same). These courts applied Strickland regardless of whether that court held that the person's right to effective counsel arose from statute or the constitution.

Ontiberos, 287 P.3d at 868. In rejecting the K.F.G. analysis, the court noted no other jurisdiction had adopted it, and stated:

> The Montana court's criticism of Strickland appears partially based on the abbreviated, 2–day time frame in which persons found to be a danger to themselves are civilly committed under Montana's commitment statutes. 306 Mont. at 8, 29 P.3d 485 ("[T]he conduct of counsel during those few available hours prior to an involuntary commitment hearing or trial should be a key focal point of the inquiry as to whether the counsel's representation was effective."). But that process is distinguishable from

> KSVPA proceedings because counsel has substantially more time to prepare under the KSVPA since the statute requires a trial within 60 days of the probable cause hearing..

Id. *See also* In re Detention of Moore, 167 Wash.2d 113, 216 P.3d 1015, 1020-1021 (2009) (applying Strickland in a sexual predator proceeding); In re Det. of T.A.H.-L., 123 Wash. App. 172, 97 P.3d 767, 771-72 (2004) (rejecting K.F.G. analysis and finding Strickland analysis sufficient to protect the right to effective assistance of counsel in civil commitment cases). As these courts found, the Strickland standard is well known and supported by a well-developed body of case-law, and there is no reason to create a separate standard for civil commitment cases. Ontiberos, 287 P.3d at 867.

The SVPA affords counsel substantially more than two days to prepare the case for trial. The earliest trial date under the statute is sixty days from the circuit court's finding of probable cause, assuming the court appointed evaluator does not get an extension of time to prepare the evaluation report, and neither party seeks an independent evaluation. If a party does seek an independent evaluation, the statutory trial deadline is ninety days from the date of the court appointed evaluator's report, and either party can seek a continuance for good cause. Therefore, as the court found in Ontiberos, the K.G.F. analysis is unnecessary.

If the Court finds the SVPA statutory right to counsel includes the right to effective assistance of counsel, the State submits the standard for habeas corpus relief is appropriate for ineffective assistance of counsel claims in SVPA cases. The Strickland standard can then provide a framework for determining whether counsel's performance was so deficient it was shocking to the conscious and undermined the fundamental fairness of the SVPA proceeding.

Appellant has an available procedure to raise ineffective assistance of counsel claims, if such a right exists, which will result in development of a full record for appellate review, and he should not be able to circumvent well established issue preservation rules by raising his claims in this direct appeal. While remand may be possible, remanding this case will set a precedent for similar claims in virtually all SVPA proceedings, and any other proceeding in which habeas relief is available but inconvenient. Therefore, even if the Court finds a right to effective assistance of counsel exists in SVPA cases, the Court should find Appellant's claims are not preserved for direct review, and affirm Appellant's commitment as a sexually violent predator.

II. If the Court considers Appellant's ineffective assistance of counsel allegations on direct appeal, they are premised on speculation, misstatements of the record, and appellate counsel's opinions regarding what trial counsel should have done, without benefit of trial counsel's input. (Appellant's Issues 3-6).

Assuming there is a right to effective assistance of counsel under the SVPA statutory right to counsel, Appellant contends trial counsel's purported performance deficiencies are sufficiently demonstrated by the record, and this Court can readily rule on his ineffective assistance allegations without further information. To the contrary, in the event the Court considers Appellant's ineffective assistance claims in this direct appeal, except for one allegation legally inaccurate on its face, each purported deficiency is premised on speculation, misstatements of the record, and appellate counsel's opinions, all without benefit of trial counsel's input. In Strickland, the U.S. Supreme Court acknowledged the importance of considering trial counsel's strategy during trial:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

466 U.S. at 690-91.

This case involves an experienced trial counsel, who had experience with SVPA cases. He vigorously cross-examined the State's expert about the basis for his opinion and presented two witnesses on Appellant's behalf, including an expert. It is inherently

unfair to judge counsel's trial performance without affording him a reasonable opportunity to respond to allegations regarding the effectiveness of his representation.

Further, in order to respond to such allegations without counsel's input, which are still protected by the attorney/client privilege, the State must speculate regarding matters outside the record, such as counsel's interaction with his client, and his strategic decisions at trial. With that limitation in mind, the State submits each allegation is meritless.

A. Cross-Examination of Dr. Burke (Appellant's Issue 3)

Appellant first contends trial counsel was ineffective by failing to impeach Dr. Burch regarding purported bias based on a purported financial interest in the company manufacturing the penile plethysmograph (PPG) he uses extensively in his practice. He cites many cases involving a court's refusal to allow cross-examination, which simply do not apply to the case.[8] At no time was Appellant's cross-examination limited in any way, and he was free to question Dr. Burke's association with companies that make the PPG machine.

The ability to cross-examine, however, does not always mean cross-examination is good trial strategy, a decision based on knowledge and observations of the witness and the jury during trial. Dr. Burke was obviously well versed in the delicacies of testifying, and given the extent of his knowledge in the area of sex offender evaluations, including

[8] In fact, virtually all the cases Appellant cites, which involve limitation of cross-examination, simply do not apply in this case because the court never limited Appellant's cross-examination in any significant way. There are many strategic reasons not to cross-examine a particular witness about a particular subject, including the danger they may say something unexpected that is devastating to your case.

the validity of various tools and tests used in such evaluations, it is doubtful his credibility before the jury would have been torn to shreds by harping on information he voluntarily gave the jury during his direct examination. Indeed, trial counsel had the opportunity to observe the jury during Dr. Burke's direct testimony, and may have legitimately decided to focus the cross-examination on parts of Dr. Burke's testimony about which the jury seemed to be less than receptive and might make at least one juror have reasonable doubt.

Dr. Burke readily admitted he works for/with Limestone Technologies and another company that makes the PPG machines, and he worked with them to develop the Real Child Voices Stimulus Package. It is reasonable to assume Dr. Burke received compensation for this time and input in developing the stimulus package, but there is no indication his arrangement was a "partnership" giving him an ownership interest in the final product.

Rather than waste time and risk antagonizing the jury, trial counsel legitimately attacked Dr. Burke's methodology, his assumptions, some statistics he referenced on direct, his knowledge of research and articles in the field, and Appellant's risk to reoffend, which Dr. Burke testified was low on certain instruments, moderate on another, and high on a third test, Indeed, counsel challenged Dr. Burke's opinion on many fronts designed to undermine Dr. Burke's credibility, and confuse the jury in the hope it would raise reasonable doubt. These are the types of strategic decisions trial counsel faces in every trial. Since appellate counsel is not in the courtroom to read the jury's faces and body language, he has no legitimate basis to challenge those decisions, and absent an

evidentiary hearing with the attorney/client hearing waived, appellate courts have no basis to review them.[9]

B. Admission of PPG Evidence (Appellant's Issue 4)

Appellant next contends trial counsel was ineffective for failing to seek exclusion of the PPG evidence, arguing it "is quackery masquerading as science," and allowing it in evidence substantially prejudiced him because Dr. Burke considered it an important factor in reaching his conclusions regarding Appellant.[10] He premises this argument on case law regarding the admissibility of polygraph evidence, and older cases questioning the PPG's reliability, while ignoring the growing number of jurisdictions and professionals acknowledging the PPG is a valid tool for use during the evaluation and treatment of sex offenders.

There are no South Carolina appellate court cases directly addressing the admissibility of testimony regarding the PPG. This Court and the Court of Appeals, however, have referenced testimony regarding PPG results in analyzing the sufficiency of evidence to support the verdicts in SVPA cases. *See* In re Care & Treatment of Tucker, 353 S.C. 466, 578 S.E.2d 719, 721 (2003) ("Appellant was administered a Penile Plethysmograph (PPG), which is designed to measure sexual responsiveness to a variety of stimuli across gender, age, and sexual activity. The PPG suggested female and male

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[9]Appellant cites a legal textbook on trial techniques as an example of how trial counsel could have attacked Dr. Burke's bias. Such academic references may serve as a basic guide for what type of questions to ask, but they do not, and cannot, make the strategic decision to undertake a particular line of cross-examination, or not to pursue it, in light of other things happening at trial.

[10]Appellant uses sarcasm and rhetoric throughout the Brief. The State does not intend to acknowledge it, or respond in kind.

preschoolers (ages two to four years) aroused appellant."); In re the Care and Treatment of Kennedy, 353 S.C. 394, 578 S.E.2d 27, 38 (Ct. App. 2003) (In support of his argument, Kennedy asserts that because he passed the Penile Plethysmography (PPG) test, which is used to test sexual arousal to children, this was the best evidence that he would not re-offend.").[11] In addition, recent case law, reference books and treatises, indicate the PPG now has significant support in the mental health field.[12]

Of particular note, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed. (DSM-V), sometimes called "the Bible" for mental health professionals, provides:

> The most widely applicable framework for assessing the strength of a paraphilia itself is one in which examinees' paraphilic sexual fantasies, urges, or behaviors are evaluated in relation to their normophilic sexual interest and behaviors. In a clinical interview or on self-administered questionnaires, examinees can be asked whether the paraphilic sexual fantasies, urges, or behaviors are weaker than, approximately equal to, or stronger than their normphilic sexual interests and behaviors. The same type of comparison **can be, and usually is,** employed **in psychophysiological measures of sexual interest, such as penile plethysmograpy** in males or viewing time in males and females.

DSM-V, p. 686 (emphasis added). It further provides:

> **Psychophysiological measures of sexual interest may sometimes be useful when an individual's history suggest the possible presence of pedophilic disorder but the individual denies strong or preferential**

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[11]In a currently pending SVPA case, the circuit court found the PPG is recognized in the relevant field, and evidence regarding it is admissible as evidence at trial under State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979), and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), which established a test for admissibility less stringent than the federal Frye test.

[12] Like virtually all areas of expertise, mental health experts' disagreement regarding the validity of particular tests/tools used by a significant number of practitioners to diagnose and/or treat mental health issues goes to the evidences weight rather than its admissibility.

attraction to children. <u>The most thoroughly researched and longest used of such measures is penile plethysomograph</u>, although sensitivity and specificity of diagnosis may vary from one site to another.

DSM-V, p. 699 (emphasis added). Thus, the most widely recognized reference book in the mental health field acknowledges the PPG is a valid tool used by the mental health community to provide data particularly relevant to determining a person's risk to reoffend. *See also* Dean Tong, <u>The Penile Plethysmograph, Abel Assessment for Sexual Interest, and MSI-II: Are They Speaking the Same Language?</u>, 35 Am. J. of Fam. Therapy, 187, 190 (2007) ("The PPG, when administered properly, represents a direct and objective measurement of a man's level of sexual arousal to normal versus sexualized stimuli. Since there is a strong relationship between an individual's pattern of sexual arousal and the probability that he may or will act upon that arousal, an important first step in gauging one's propensity to sexual deviancy is to obtain an accurate assessment of that person's sexual arousal patterns, which is precisely what the PPG does."); James M. Peters, <u>Assessment and Treatment of Sex Offenders: What Attorneys Need to Know</u>, Advocate, Dec. 1999, at 23 (1999) (PPG "is invaluable in the evaluation, treatment and management of known sexual offenders.")

The Second District Appellate Court of Illinois addressed the admissibility of PPG evidence in Illinois sexual predator cases, finding "a significant subset of experts considers PPG testing a useful tool for treating and evaluating sex offenders." <u>In re Commitment of Sandry</u>, 367 Ill.App.3d 949, 857 N.E.2d 295, 309 (Ill.App.Ct, 2nd Dist., 2006). The court noted case law in at least twenty-one states mentioned the use of PPG testing, and academic literature revealed a substantial number of experts consider the PPG useful for dealing with sex offenders. *Id.* at 310-316. *See also* <u>State v. Fullwood,</u>

22 So.3d 655 (Fla.Ct.App., 3rd Dist. 2009) (PPG evidence was properly admitted at trial without a Frye hearing because the test is not new and novel science, and Frye hearing not required); In re Detention of Halgren, 124 Wash.App. 206, 98 P.3d 1206, 1213-1215 (2004) (same).

In short, contrary to Appellant's assertion trial counsel was ineffective because the PPG evidence was absolutely inadmissible, it is not clear the PPG evidence would have been excluded in this case. Dr. Burke had extensive experience with the PPG, readily acknowledged prior problems with the test, and testified about changes to the test that significantly reduced false positives or negatives, as well as increased identification of various factors that may invalidate the results, like the person moving around in the chair, holding his breath, and closing his eyes. He actually participated in developing some of those changes, and in studies regarding the reliability of the test as a result of those changes. (TT, pp. 98-106; R., pp. 98-106).

Trial counsel had previously handled SVPA cases and was well aware of PPG evidence. He also knew Dr. Burke was a very credible witness, and it was highly likely the PPG evidence would come in as evidence. The State gave counsel free access to Dr. Burke prior to trial to discuss the evaluation, and based on his discussion with Dr. Burke, counsel may well have made a strategic decision not to move to exclude the PPG evidence based on the strength of Dr. Burke's knowledge, which would be strong support for admitting the evidence. Appellant may contend this is pure speculation, and he will be right, but speculation is all the State has without a proper habeas proceeding at which the attorney/client privilege is longer an obstacle, and trial counsel has an opportunity to address the issue.

Finally, Dr. Burke made it clear the PPG results was only one part of an extensive evaluation, but it took on more significance for him after Appellant denied committing all the crimes to which he pled guilty, said he did not have any deviant urges, and did not need any sex offender treatment. The PPG results casted significant doubt on the validity of Appellant's self-report. Considering the other parts of Dr. Burke's evaluation, however, there was sufficient evidence, even without the PPG, to support his conclusion Appellant met the criteria for commitment. Therefore, even if it was error to admit the PPG evidence, which the State strongly disputes, there is nothing indicating it was so prejudicial it likely impacted the jury's verdict. Rather, the jury's verdict was more likely based on the thoroughness of Dr. Burke's evaluation, Appellant's past conduct, his continued refusal to really accept responsibility for his sexual offenses, the clear indication he needs sex offender treatment for his undisputed pedophilia diagnosis, and his belief he did not need sex offender treatment, which made it extremely unlikely Appellant would participate in treatment if not confined for it.

This issue starkly demonstrates why ineffective assistance of counsel allegations are not proper for consideration on direct appeal when Appellant can use the common law habeas corpus proceeding. Such a proceeding affords the parties an opportunity to create an appropriate record for appellate court review.

C. Motion to Dismiss (Appellant's Issue 5)[13]

Appellant asserts trial counsel was ineffective by failing to seek dismissal on the ground the SVPA requires five members on the Multidisciplinary Team (MDT), and only four members were present when the MDT considered his case and found probable cause to believe he is a sexually violent predator. Under existing precedent from this Court, Appellant's assertion is legally inaccurate on its face.

Absent a statutory or other controlling provision, under the common-law rule, a majority of a board is necessary to constitute a quorum, and the board may not act in the absence of a quorum. In re Matthews, 345 S.C. 638, 550 S.E.2d 311, 314-15 (2001). The SVPA does not require all members of the MDT to be present at each meeting, or that the MDT decisions be unanimous, or made by any majority other than a simple majority. *Id.* at 315 (four members of the MDT constitute a quorum sufficient to issue a decision regarding whether person qualified as a sexually violent predator under the SVPA).

The MDT requirements under the SVPA have not changed since Matthews was decided in 2001. Appellant concedes four members of the MDT were present when his case was considered, and as in Matthews, all four members present voted to refer his case for further action.[14] Thus, a quorum was present, and any motion to dismiss by trial

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[13]The Brief Table of Contents references this as Issue 5, but it is labeled Issue 6 in the body of the Brief.

[14]Appellant's contention the retired judge is "the most important member" of the MDT "for protecting his rights," conveniently ignores the **practicing criminal defense attorney** member of the MDT, who is most likely to instinctively protect the person's rights.

counsel on this ground would have been **patently** frivolous, and arguably violate counsel's ethical duty not to raise frivolous issues.

D. Evidence Regarding SVPTP (Appellant's Issue 6)[15]

Appellant asserts trial counsel was ineffective "when he acquiesced in the State's attempt to keep the lack of treatment in the SVP program from the jury." He further asserts counsel was ineffective by failing to ask questions about the treatment program after the State "opened the door" during opening statement. Both assertions are meritless.

In a SVPA trial, the jury must find beyond a reasonable doubt the person has been convicted of a sexually violent offense, and has a mental abnormality or personality disorder that makes him likely to reoffend sexually "**if not confined in a secure facility** for long-term control, care, and treatment." S.C. Code Ann. §44-48-30 (Supp. 2014) (emphasis added). Thus, under the plain language of the statute, the relevant elements for the jury are 1) a sexually violent offense conviction, 2) a mental abnormality or personality disorder, 3) which makes the person likely to reoffend sexually, 4) unless the person is confined for long-term treatment.

The location of the secure facility and the efficacy of the treatment provided there are absolutely irrelevant during an SVPA commitment trial, and any evidence regarding those issues is potentially confusing for the jury. The State sought to exclude such evidence in this case because respondents in SVPA cases routinely elicit testimony

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[15]The Brief of Appellant Table of Contents references this as Issue 6, but it is labeled Issue 7 in the body of the Brief.

revealing the SVP treatment program is currently located in the former "death row" at Broad River Correctional Institution, and attacking the treatment provided there, in order to focus the jury on those irrelevant issues.[16] By agreeing not to offer clearly irrelevant evidence and needlessly complicate the trial, trial counsel acted ethically, which is not ineffective assistance of counsel.

Appellant's argument the State opened the door to those issues ignores the focus of the SVPA, and **drastically** takes the State's opening statement completely out of context. As noted above, the jury had to find beyond a reasonable doubt Appellant needed treatment, and was likely to reoffend if not confined for treatment. When considered in context, it is clear the State's opening statement merely summarized the statutory elements, which had **nothing** to do with either the location of the secure facility, or the efficacy of the treatment provided there.

Dr. Burke diagnosed Appellant with pedophilia, and testified he needed to be confined for proper treatment. Significantly, Appellant told Dr. Burke he was "innocent and he didn't need [treatment]," thus making it highly unlikely Appellant would either voluntarily seek, or actively participate in, sex offender treatment if not confined. (TT, p. 108-113; R., pp. 108-113). *See* Kennedy, 678 S.E.2d at 28 (expert testified

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[16]Indeed, Appellant makes the "death row" reference in his Brief. (Brief of Appellant, p. 13) ("A person facing a lifetime of being warehoused at South Carolina's former Death Row deserves no less."). This statement, and many other statements in Appellant's Brief, i.e., the only reason Appellant faced commitment was "the sad circumstances surrounding the revocation of his probation," clearly reveal the strategy used in most SVPA cases - denigrate the law and the program in order to invoke the jury's (or court's) sympathy and draw attention away from the person's history and mental status.

Kennedy's denial of his sexual conduct made him less likely to pursue outpatient treatment, and therefore, he needed the supervision of inpatient treatment.)

The jury's questions during deliberations indicate introducing evidence about the specific type of sex offender treatment Appellant would receive, and how long he would be confined for treatment would have injected totally unnecessary, and potentially confusing, factors outside the scope of the jury's role in a SVPA commitment trial, and what the jurors had to find to reach a verdict in the case before them. The jury's interest in what happens after trial is certainly understandable, but it does not, and should not, have any bearing on the jury's duty in a SVP trial.

As noted above, trial counsel is an experienced trial attorney, who previously handled other SVPA cases, and his performance at trial establishes he knew how to properly and ethically present Appellant's case. An adverse jury verdict does not indicate counsel was ineffective, and the record simply does not support any of Appellant's ineffective assistance claims.

CONCLUSION

Based on the foregoing, Respondent submits the jury verdict finding Appellant is a sexually violent predator beyond a reasonable doubt should be affirmed.

Respectfully submitted,

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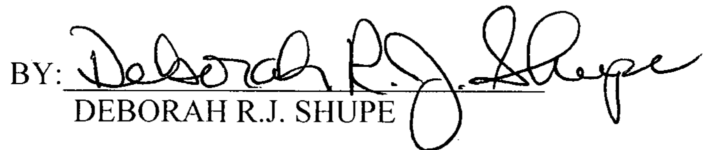

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May 11, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2014-001959

IN THE MATTER OF THE CARE AND TREATMENT OF
DAQUAN JOHNSON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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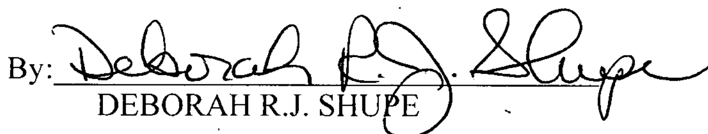

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