

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**ORIGINAL**

Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

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IN THE MATTER OF THE CARE AND  
TREATMENT OF JIMMY RAY FILYAW,

APPELLANT

APPELLATE CASE NO 2018-000425

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**RECEIVED**

ANDERS BRIEF OF APPELLANT

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DEC 10 2018

SC Court of Appeals

DAVID ALEXANDER  
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**STATEMENT OF ISSUE ON APPEAL**

In this sexually violent predator case, did the trial court err in refusing to grant a directed verdict because the Attorney General's expert testified that appellant only had a 7.9% chance to reoffend within five years, which does not satisfy the State's burden of proof?

## STATEMENT OF THE CASE

The Attorney General sought appellant's commitment as a sexually violent predator and on February 12, 2018, appellant was tried in Florence County before the Honorable D. Craig Brown, and a jury. R. 1. James G. Bogle, Jr. represented the Attorney General and James K. Falk represented appellant. R. 1. The jury found appellant met the statutory definition of a sexually violent predator and Judge Brown ordered him committed. R. 359, l. 7 – 365, l. 13. This appeal follows.

## STANDARD OF REVIEW

“When reviewing a trial court's ruling on a directed verdict motion, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law.” McKaughan v. Upstate Lung & Critical Care Specialists, P.C., 421 S.C. 185, 189, 805 S.E.2d 212, 214 (Ct. App. 2017) quoting Burnett v. Family Kingdom, Inc., 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010). “When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” Id. “The trial court must deny a directed verdict motion where the evidence yields more than one inference or its inference is in doubt.” Id.

## ARGUMENT

In this sexually violent predator case, the trial court erred in refusing to grant a directed verdict because the Attorney General's expert testified that appellant only had a 7.9% chance to reoffend within five years, which does not satisfy the State's burden of proof.

The Attorney General's expert, Dr. Amy Swan from Florida, diagnosed appellant with pedophilia. R. 231, l. 18 – 232, l. 4. She admitted that pedophilia can be treated and pedophiles can be taught strategies to control their urges. R. 232, l. 20 – 233, l. 5. Dr. Swan also diagnoses appellant with "alcohol use disorder." R. 233, ll. 6 – 15.

Dr. Swan used an actuarial table called the Static 99-R to measure appellant's risk to reoffend sexually. R. 235, ll. 1 – 23. She called the Static 99-R "the most commonly used risk assessment instrument around the world for assessing risk in sex offenders." R. 235, ll. 11 – 20. The worst score a person can get on the Static 99-R is a 12 and appellant scored a 3. R. 235, l. 21 – 236, l. 14.

On direct-examination, Dr. Swan exaggerated the risk posed by appellant by testifying that appellant's score placed him in the "66<sup>th</sup> percentile" and that only 25% of sex offenders have a greater risk of reoffending than appellant. R. 236, ll. 4 – 22. She agreed with the Attorney General that appellant was "one and a half times more likely to reoffend sexually than the average sex offender." R. 236, ll. 20 – 22.

On cross-examination, defense counsel asked Dr. Swan what the Static 99-R gave as appellant's absolute risk to reoffend and at first, Dr. Swan refused to answer the question. R. 267, l. 25 – 268, l. 7. She said, "I will not say what his absolute risk is because the developers of the Static 99-R—it was reformulated." R. 268, ll. 2 – 7. She claimed that the developers "said

we should not use the absolute risk because they are too unstable.” R. 268, ll. 2 – 7. She asserted that only the relative risk ranks should be used. R. 268, ll. 2 – 7.

Defense counsel pressed the issue by forcing Dr. Swan to review the “Evaluator’s Workbook.” R. 268, ll. 11 – 23. He showed Dr. Swan a page and she agreed that it said “the Static 99-R recidivism estimate of appellant’s score of “3” is 7.9%. R. 268, ll. 21 – 23. When asked if it was not necessary to know during his trial what his recidivism rate is, Dr. Swan said, “It is absolutely not because he—the Static 99 dramatically underestimates this particular individual’s risk.” R. 269, ll. 5 – 9. She read a note from someone she claimed re-normed the Static 99-R in 2016 that said not to use the recidivism rates “unless absolutely necessary.” R. 269, ll. 1 – 4.

When asked whether a 7.9% risk to reoffend “is a likelihood to reoffend,” Dr. Swan said, “That is his likelihood to be arrested or convicted in five years. That is not his likelihood to commit another sexual crime.” R. 269, ll. 20 – 25. Again, defense counsel pressed the issue with the Florida expert and asked whether a 7.9% chance meant something was “likely to happen.” R. 270, ll. 1 – 4. Dr. Swan conceded, “Typically, that would not be likely, but as we’re saying, our job is not to determine if he’s likely to be arrested or convicted, which that figure tells us. Our decision is whether he’s likely to commit another sexual crime during the rest of his life.” R. 270, ll. 5 – 9. At the time of his trial, appellant was sixty-five (65) years old. R. 240, ll. 15 – 16.

The Attorney General rested after Dr. Swan’s testimony and appellant moved for a directed verdict. R. 275, ll. 17 – 24. Appellant argued that a 7.9% risk was insufficient to satisfy the element of likelihood to reoffend as required by the statute. R. 275, ll. 17 – 24. The

Attorney General argued the Static 99-R results were only part of Dr. Swan's evaluation. R. 276, ll. 1 – 8. The trial judge agreed and denied the directed verdict motion. R. 276, ll. 9 – 15.

No reasonable juror could conclude that a 7.9% chance to reoffend within five years satisfies the likelihood of reoffending element. See State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) (“Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.”). The five-year recidivism rate for all inmates released by SCDC for 2012, the last year available, was 30.9%, nearly eight times higher than appellant's risk.<sup>1</sup> “The purpose of the SVPA is to involuntarily commit only a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be an indefinite term of confinement.” In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013) (internal quotations omitted) (emphasis added).

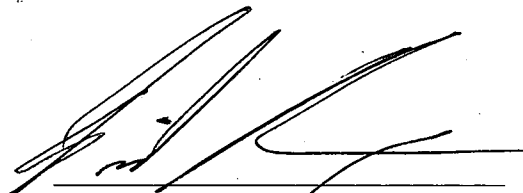
As appellant's score on the Static 99-R and low risk to reoffend shows, appellant is not in this “limited subclass of dangerous persons” and his case should never have been submitted to the jury. Appellant is over sixty-five years old and poses no significant risk to the community. He is not one of the “worst of the worst.” The trial judge erred in not directing a verdict. This Court should reverse.

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<sup>1</sup> This data is from the Department of Corrections' website. <http://www.doc.sc.gov/research/SpecialReports/RecidivismRatesOfInmatesReleasedDuringFY2010-FY2014.pdf>.

**CONCLUSION**

For the foregoing reasons, the judgment of the trial court should be reversed and appellant should be immediately released from confinement.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of December, 2018.

STATE OF SOUTH CAROLINA  
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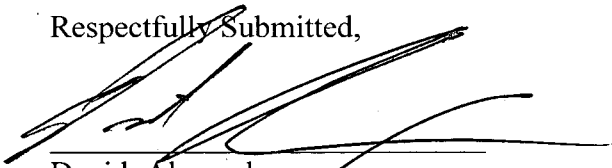
PETITION TO BE RELIEVED AS COUNSEL **SC Court of Appeals**

Counsel for Jimmy R. Filyaw 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 D. Craig Brown, which was held on February 12-13, 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 Jimmy R. Filyaw.

Respectfully Submitted,

  
David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 10th day of December, 2018.

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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 (February 12-13, 2018)
- (2) Court's Exhibit #1 (Blank Questionnaire)
- (3) Court's Exhibits #3-5 (Respondent's Motion)
- (4) Court's Exhibits #6-7 (State's Motion)
- (5) Court's Exhibit #9 (Proposed Charges)

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

December 10, 2018



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Appellate Defender

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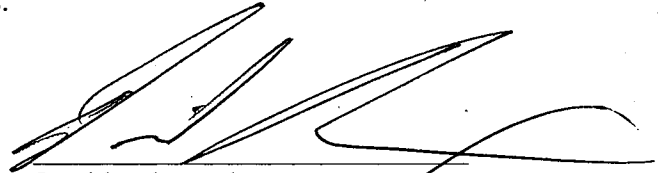
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**CERTIFICATE OF COUNSEL**

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."

December 10, 2018.



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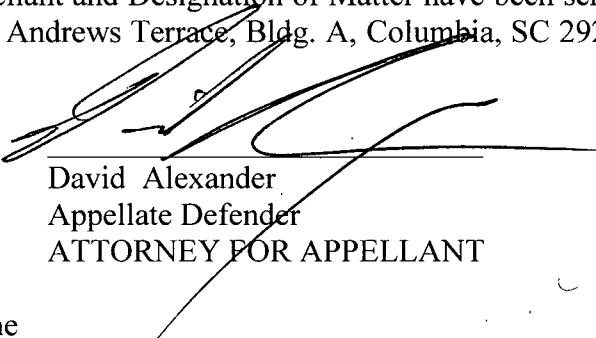
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CERTIFICATE OF SERVICE

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 Jimmy R. Filyaw, at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 10th day of December, 2018.

  
David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 10th day of December, 2018.

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