STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Aiken County
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2018-000527

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In the Matter of the Care and Treatment of
Richard D. Ridley, Appellant

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# FINAL BRIEF OF RESPONDENT

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ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

The circuit court did not abuse its discretion in admitting expert testimony regarding the diagnosis of Other Specified Paraphilic Disorder (Biastophilia/Non-Consent), because the evidence established the diagnosis is generally accepted in the mental health community, and Appellant was able to cross-examine the State's expert, and present his own expert, regarding some mental health clinicians' rejection of the diagnosis.

## STATEMENT OF THE CASE

In 2014, Appellant Richard D. Ridley was committed to the South Carolina Department of Mental Health (DMH) Sexually Violent Predator Treatment Program for long term control, care and treatment pursuant to the South Carolina Sexually Violent Predator Act (SVPA). His mental status was reviewed in 2015, 2016, and 2017, and DMH did not determine his mental status had so changed he is safe to be at large. In 2017, Appellant petitioned for release against DMH's recommendation.

The matter was called for a jury trial on February 26, 2018, before the Honorable Doyet A. Early, III, Circuit Court Judge. Assistant Attorney General Christopher A. Morrow represented the State, and A. Bea Hightower, Esquire, represented Appellant. The jury found Appellant's mental status had not so changed he is safe to be at large. This appeal followed.

## STATEMENT OF FACTS

In June 2002, Appellant Richard D. Ridley pled guilty to one count of assault and battery of a high and aggravated nature, and one count of criminal sexual conduct in the third degree, arising from his molestation of two minor males. He also pled guilty to one count of failure to register as a sex offender, arising from his failure to register when he moved to South Carolina from New York, where he was a registered sex offender. He was sentenced to ten years incarceration.

Prior to his release from prison, Respondent State of South Carolina ("the State") filed a petition pursuant to the SVPA, seeking Petitioner's civil commitment for long term control, care and treatment as a sexually violent predator. The court appointed evaluator diagnosed Appellant with Other Specified Paraphilic Disorder (Biastophilia) and Antisocial Personality Disorder with Narcissistic Traits, and recommended commitment. Appellant voluntarily committed to the South Carolina Department of Mental Health (DMH) Sexually Violent Predator Treatment Program on August 25, 2014.

In accordance with the SVPA, DMH reviewed Appellant's mental status in 2015, 2016 and 2017, and determined his mental status had not so changed he was safe to be at large. Appellant moved for release against DMH's recommendation, and the matter was called for a jury trial on February 26, 2018, before the Honorable Doyet A. Early, III, Circuit Court Judge.

Prior to trial, Appellant moved to exclude any evidence regarding the Other Specified Paraphilic Disorder (Biastophilia/Non-Consent) diagnosis on the ground it was not scientifically reliable.[1] After hearing testimony from Gordon Edward Brown, Jr., Ph.D, and argument of counsel, the court acknowledged there was debate within the mental health community regarding

[1]Appellant did not challenge the diagnosis of Antisocial Personality Disorder with Narcissistic Traits, and does not challenge it on appeal.

the diagnosis and some courts had excluded it, but found the debate went to the weight of the evidence rather than its admissibility, and allowed the evidence. (Trial Transcript [TT], pp. 28-56, Court's Exhibit 1 [Motion in Limine]; Record on Appeal [R.] pp. 28-56, 373-466).

Dr. Brown was qualified as an expert in forensic psychology. He testified he worked in the DMH Sexually Violent Predator Treatment Program for approximately two and a half years providing treatment and conducting residents' annual review evaluations. After the treatment portion of the program was privatized in 2016, he continued doing annual review evaluations and started doing some pre-commitment evaluations. (TT, pp. 84-95; R., pp. 84-95).

Dr. Brown testified he conducted Appellant's annual reviews in 2015, 2016 and 2017. As part of the review, he looked at the documentation related to Appellant's criminal offenses, the pre-commitment evaluation, and all records regarding Appellant's treatment in the program. He also interviewed Appellant for a total of approximately ten hours over the course of the three annual reviews. Dr. Brown stated this is the type of information typically and reasonably relied on by mental health experts. (TT, pp. 95-99; R., pp. 95-99).

The records revealed Appellant was convicted in New York on two counts of sodomy and one count of sexual abuse third degree (subjecting a person to sexual conduct without consent) in 1996. In 1997, Appellant was convicted in New York on five counts of sexual criminal act, sodomy third degree (deviant intercourse with a person under seventeen), and one count of acting in a manner injurious to a child under seventeen. In 2001, Appellant was charged with two counts of criminal sexual conduct in the third degree, and one count of assault with intent to commit criminal sexual conduct second degree. In 2002, Appellant was convicted on one count of criminal sexual conduct in the third degree, arising from his molestation of an employee when he was employed as a manager at a fast food restaurant, and on one count of assault and battery of a

high and aggravated nature, arising from an incident in the Aiken County Detention Center during which Appellant forced another inmate to masturbate and perform oral sex on Appellant by threatening to rape and kill the inmate. (TT, pp. 99-115; R., pp. 99-115).[2]

Dr. Brown testified he considered Appellant's convictions and charges in determining if there was a pattern of behavior of forcing others to engage in sexual activity. Based on his review of the legal records and treatment records, and his interviews of Appellant, Dr. Brown concluded Appellant had made "very little" progress in treatment. While Appellant participated in treatment "in some ways," by doing assignments and giving feedback to other residents in group sessions, he was not receptive to feedback himself, and he "spent more time fighting the commitment and trying to argue that he doesn't need treatment," rather than "engaging in treatment to try to progress to the point where he can be recommended [for release]." (TT, pp. 115-118; R., pp.115-118).

Dr. Brown concurred with the court appointed evaluator's 2014 diagnosis of Other Specified Paraphilic Disorder (Biastophilia/Non-Consent), which is used when someone does not meet all the criteria for one of the eight distinct paraphilias specified in the Diagnostic and Statistical Manual of Mental Health Disorders (5th Ed.) (DSM-V). He also concurred with the evaluator's diagnosis of Antisocial Personality Disorder with Narcissistic Traits. (TT, pp. 119-120; R., pp. 119-120).

Dr. Brown testified the DSM-V defines a paraphilia as "any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners." He explained paraphilia

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[2]In addition to the sexually violent convictions and charges, Appellant was convicted of failure to register as a sex offender based on his failure to register when he moved to South Carolina from New York. Dr. Brown testified he considered that conviction, but did not give it as much weight in his analysis as the sexually violent offenses and convictions. (TT, p. 113; R., p. 113).

as a "strong persistent sexual arousal to something other than a mature, consenting partner, which causes "some kind of distress or impairment to the individual himself or a paraphilia that's causing harm, personal harm, or risk of harm to someone else." He further explained there were some specific paraphilic disorders listed in the DSM-V, but because Appellant did not meet the specific criteria for any of those disorders, the DSM-V's diagnosis of Other Specified Paraphilic Disorder was appropriate for Appellant. Dr. Brown testified the specifier of Biastophilia/Non-Consent was assigned because Appellant's deviant sexual arousal arose from "the idea of having sex with individuals who are not consenting," and he had a pattern appearing over several years of having sex with non-consenting individuals. (TT, pp. 119-122; R., pp. 119-122).

Dr. Brown also concurred with the court appointed evaluator's diagnosis of Antisocial Personality Disorder with Narcissistic Traits, which is "a pervasive pattern of disregard of the rights of others, violation of the rights of others occurring since the age of 15 and having to meet at least three of seven specific criteria." He testified Appellant's criminal history indicated failure to conform to social norms, and Appellant admitted having conned some of his victims into having sex, which indicated deceitfulness. Appellant also exhibited an impulsive lifestyle and consistent irresponsibility. (TT, pp. 122-124; R., pp. 122-124).

Regarding Appellant's participation in treatment since 2014, Dr. Brown testified Appellant participated "in terms of attending the groups, in terms of participating in groups and in terms of doing assignments." In essence, Appellant was "going through the acts" and "doing the things that the program's requiring him to do," but "the consistent feedback from case managers is there's no depth there." He stated Appellant "minimizes [his behavior] in terms of trying to resent (sic) victims as being more consenting than the record would indicate that they were," and he does not see his own crimes "as fitting the definition of what kind of crimes" are contemplated for the

program. He also described incidents of Appellant's behavior in the program indicating he continues "to be conniving and dishonest and making things happen the way that he thinks that they should happen." (TT, pp. 125-132; R., pp. 125-132).

Dr. Brown testified he had concerns about Appellant's plans in the event he was released from the program, which included obtaining the appropriate license to become a long distance truck driver. In light of Appellant's history, including his failure to register as a sex offender, Dr. Brown stated being a long distance truck driver would make it difficult to comply with the SVPA requirement of registration every ninety days, or to participate in the out-patient treatment Appellant claimed he wanted. (TT, pp. 134-135; R., pp. 134-135).

As part of Appellant's evaluation, Dr. Brown also utilized the Static-99R actuarial risk assessment tool, which considers various known static factors identified as posing a risk to reoffend sexually. The Static-99R scores range from minus three to twelve, and Appellant's score was nine, which is in the 99th percentile of all sex offenders in the study, puts him in the high risk to reoffend category, and indicates he is seven times more likely to reoffend than the average sex offender. In addition, Dr. Brown utilized the Static-2002R, which also placed Appellant in the high risk category. (TT, pp. 135-141; R., pp. 135-141). Dr. Brown identified several dynamic risk factors for reoffending applicable to Appellant, which are not factored into the actuarial risk assessment tools, including sexual preoccupation, preference for pubescent or adolescent males, a lack of emotionally intimate relationships with adults, lifestyle impulsiveness, poor problem solving, and resistance to rules and supervision. (TT, pp. 141-144; R., pp. 141-144).

Dr. Brown testified to a reasonable degree of psychological certainty that Appellant has the mental abnormality of Other Specified Paraphilic Disorder (Biastophilia/Non-Consent), and the personality disorder of Antisocial Personality Disorder with Narcissistic Traits. He also

testified to a reasonable degree of psychological certainty Appellant is likely to commit future acts of sexual violence if released. (TT, pp. 145-146; R., pp. 145-146).

On cross-examination, Dr. Brown acknowledged that Biastophilia/Non-Consent is not a specific paraphilic disorder listed in the DSM-V, and there is disagreement in the mental health community regarding whether "rape" is a mental disorder. He testified, however, that the DSM-V does allow for the Other Specified Paraphilic Disorder diagnosis, and opined that Biastophilia/Non-Consent does meet the criteria of a mental abnormality as set forth in the SVPA. On re-direct, Dr. Brown again acknowledged some people in the mental health community do not recognize Biastophilia/Non-Consent as a legitimate diagnosis, but stated "there are other experts who say very strongly yes it is," and he agreed with that opinion. (TT, pp. 176-187, 223-225; R., pp. 176-187, 223-225).

Appellant presented Selman Watson, Ph.D, who was qualified as an expert in psychology and forensic psychology, and testified he was the acting director of the DMH Sexually Violent Predator Treatment Program from 2003 to 2007. He evaluated Appellant as part of Appellant's petition for release, and in the course of the evaluation he reviewed all the available documentation and interviewed Appellant for a total of approximately ten hours. (TT, pp. 232-243; R., pp. 232-243).

Dr. Watson opined that Biastophilia/Non-Consent is not a valid diagnosis, and should not be considered a specified paraphilic disorder. He stated "rape is not the result of a mental abnormality," but "is a result of criminal behavior," because it does not arise from sexual urges the person cannot control. He further stated someone could "be a rapist without any kind of personality disorder," and "rape itself is not generated or a product of a mental abnormality," "but is a crime of aggression, power and control over the victim." (TT, pp. 244-248; R., pp. 244-248).

Dr. Watson disagreed with most of Dr. Brown's testimony regarding Appellant's dynamic risk factors. Even though he acknowledged there were discrepancies between the records and Appellant's statements during the interviews, he opined that Appellant had benefitted from the treatment he received in the DMH program, and is safe to be at large, but he would recommend Appellant receive follow-up care. (TT, pp. 249-275; R., pp. 249-275).

On cross-examination, Dr. Watson again acknowledged discrepancies between what Appellant told him and what the records reflected. He also acknowledged a treatment progress note generated a week before the trial indicated Appellant engaged in minimization, jumping to conclusions, manipulations, deceitfulness, poor problem solving, and dysfunctional coping. The note further stated Appellant was observed spending an excessive amount of time with a resident "in his arousal window," and admitted an attraction to the resident "physically, but not mentally and emotional." Dr. Watson agreed Appellant's victims were younger males, but stated Appellant's efforts to manipulate them were not grooming behaviors. (TT, pp. 275-285; R., pp. 275-285).

Dr. Watson also testified he sent Appellant to Dr. William Burke for a penile plethysmography (PPG) to gauge Appellant's sexual arousals. The PPG results indicated arousal to adult males (persuasive context), teen females (persuasive presentations), teen males (persuasive presentations), and teen males (coercive situations). He explained the coercive context involves "some use of force," and "sort of can be a rape scenario." (TT, pp. 286-289; R., pp. 286-289).

The jury found beyond a reasonable doubt that Appellant's mental status remains such he is not safe to be at large, and if released is likely to commit acts of sexual violence. (TT, pp. 368-369, Order of Continued Confinement filed February 28, 2018; R., pp. 368-369, 480). This appeal followed.

## STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice." State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009).

## ARGUMENT

**The circuit court did not abuse its discretion in admitting expert testimony regarding the diagnosis of Other Specified Paraphilic Disorder (Biastophilia/Non-Consent), because the evidence established the diagnosis is generally accepted in the mental health community, and Appellant was able to cross-examine the State's expert, and present his own expert, regarding some mental health clinicians' rejection of the diagnosis.**

Appellant contends the circuit court erred in admitting Dr. Brown's testimony regarding Appellant's Other Specified Paraphilic Disorder (Biastophilia/Non-Consent) diagnosis, asserting the diagnosis is scientifically unreliable because some mental health clinicians reject it, and two lower courts in New York found it was not admissible. Appellant's contention overlooks other evidence and case law indicating that while there is some disagreement among clinicians regarding the validity of the diagnosis, it is generally used and accepted in the mental health community.

Appellant's argument blatantly ignores the fact the DSM-V not only expressly includes Other Specified Paraphilic Disorder as a valid diagnosis, it explains the circumstances under which a clinician could use the diagnosis. Recognizing the complexity of mental health disorders cannot be reduced to simple summaries of symptoms covering every situation practitioners face, the DSM-V authors provided two categories designed to "enhance diagnostic specificity."

> To enhance diagnostic specificity, DSM-5 replaces the previous NOS [not otherwise specified] designation with two options for clinical use: *other specified disorder* and *unspecified disorder*. The other specified disorder category is provided to allow the clinician to communicate the specific reason that the presentation does not meet the criteria for any specific category within a diagnostic class. This is done by recording the name of the category, followed by the specific reason. For example, for an individual with clinically significant depressive symptoms lasting 4 weeks but whose symptomatology falls short of the diagnostic threshold for a major depressive episode, the clinician would record "other specified depressive disorder, depressive episode with insufficient symptoms."
>
> * * * *
>
> The symptoms contained in the respective diagnostic criteria sets do not constitute comprehensive definitions of underlying disorders, which encompass cognitive, emotional, behavioral and physiological processes that are far more complex than

> ascan be described in these brief summaries. Rather, they are intended to summarize characteristic syndromes of signs and symptoms that point to an underlying disorder with a characteristic developmental history, biological and environmental risk factors, neuropsychological and physiological correlates, and typical clinical course.
>
> * * * *
>
> Although decades of scientific effort have gone into developing the diagnostic criteria sets for the disorders included in Section II, it is well recognized that this set of categorical diagnoses does not fully describe the full range of mental disorders that individuals experience and present to clinicians on a daily basis throughout the world. As noted previously in the introduction, the range of genetic/environmental interactions over the course of human development affecting cognitive, emotional and behavioral function is virtually limitless. As a result, it is impossible to capture the full range of psychopathy in the categorical diagnostic categories that we are now using. Hence, it is also necessary to include "other specified/unspecified" disorder options for presentations that do not fit exactly into the diagnostic boundaries of disorders in each chapter.
>
> * * * *
>
> Following the assessment of diagnostic criteria, clinicians should consider the application of disorder subtypes and/or specifiers as appropriate. Severity and course specifiers should be applied to denote the individual's current presentation, but only when the full criteria are met. When full criteria are not met, clinicians should consider whether the symptom presentation meets criteria for an "other specified" or "unspecified" designation.

DSM-V, pp. 15-16, 19, 21 (emphasis in original). Therefore, Other Specified Paraphilic Disorder is a legitimate diagnosis contained in what Appellant referenced at trial as "the bible" used for diagnosing mental health issues, and it is recognized by the vast majority of mental health practitioners.

In support of his argument regarding the validity of the diagnosis at issue, Petitioner cites several articles arguing Biastophilia/Non-Consent is not a valid paraphilic disorder specifier, and two lower court cases from New York holding the diagnosis is not admissible in civil commitment cases. Other New York cases and the majority of jurisdictions that have considered this issue, however, have found the diagnosis is sufficient for commitment as a sexually violent predator.

The South Carolina Supreme Court recently addressed a similar argument regarding a diagnosis of Other Specified Personality Disorder in the DSM-V section on personality disorders. *See* In re Snow, 425 S.C. 544, 823 S.E.2d 467 (2019). Finding the diagnosis was legally sufficient to satisfy the SVPA requirement of a personality disorder, the court found the SVPA only requires the State to prove the person suffers from a mental abnormality or personality disorder, and does not define or limit the State by restricting which mental abnormalities or personality disorders to use in satisfying the requirement. *Id.* at 469. "The obvious intent in not defining the term was to leave to medical professionals the task of determining what is – and what is not – a personality disorder." *Id.*

Similarly, given the DSM-V inclusion of Other Specified Paraphilic Disorder as a valid paraphilia diagnosis, and the discussion regarding how and when it can be used, it cannot be seriously disputed the diagnosis is a valid one recognized by the mental health community. Appellant argues that the on-going debate regarding the Biastophilia/Non-Consent specifier, and the fact it was not included in the DSM-V, renders it inadmissible as a valid diagnosis. The mere fact there is on-going debate regarding the diagnosis, however, goes to the weight of the evidence, not its admissibility. *See* State v. Graham, 275 Kan. 176, 61 P.3d 662, 667 (2003) (some disagreement in the scientific and medical community as to the reliability of a particular test method is a matter affecting the weight of such evidence and not its admissibility; such evidence is admissible if a qualified expert witness testifies the particular test method is reliable and accurate, and it is generally accepted as such by other experts in the field).

Appellant cites two New York lower court cases holding evidence regarding Biastophilia/Non-Consent is not admissible. *See* State v. Jason C., 26 N.Y.S.3d 423 (2016); State

v. Kareem M., 36 N.Y.S.3d 410 (2016). Other New York courts, however, have found the diagnosis is generally recognized and used in state and federal courts.

In State v. Daryl W., 19 N.Y.S.3d 396 (2015), the court noted a number of articles, "most of which have been written by Allen Frances, M.D., and Michael B. First, M.D.," have criticized the diagnosis of Other Specified Paraphilic Disorder (Non-consent)." The court specifically addressed the analysis set forth by those authors in Paraphilia NOS, Nonconsent: Not Ready for the Courtroom, 39 Journal of the American Academy of Psychiatry and the Law 55 (2011), an article cited and relied on by Appellant in this case.

In finding the article unpersuasive, the court noted the authors acknowledged "'the widespread use of paraphilia NOS, non-consent' under the DSM-IV-TR as a qualifying diagnosis in mental health proceedings involving the civil confinement of sexually violent predators, and that a diagnosis of 'paraphilia NOS, non-consent, has been widely used' by examiners to determine whether those sexually violent predators suffer from a mental abnormality."[3] *Id.* at 402-403 (citing the article at page 556). The court further noted the basic premise of the authors' analysis was that "the wide-spread use [of the diagnosis] is based upon a misunderstanding of the wording and intent of the DSM-IV," specifically that the paraphilia NOS non-consent diagnosis had been misused "due to 'a misreading of the poorly worded ... opening sentence of the DSM-IV paraphilia section,'" causing examiners to make "'the mistaken assumption that the text implies that the DSM-IV-TR recognizes the existence of an arousal pattern focused on the nonconsenting nature of the sexual behaviors.'" *Id.* In the face of the authors' contention, however, the court found that if such a profound misunderstanding existed, the DSM-V "would have undoubtedly included

[3]The DSM-IV included the category of Paraphilia, Not Otherwise Specified (NOS), which the DSM-V divided into Other Specified Paraphilic Disorder and Other Unspecified Paraphilic Disorder.

language clarifying this allegedly widespread misinterpretation of the DSM in proceedings involving the civil confinement of sexually violent predators," but no such language was added to the DSM-V. *Id.*

Finally, the court found that evidence of Paraphilia NOS (arousal to non-consent) had "been routinely admitted in state and federal courts, including in civil confinement cases. Significantly, the court noted there were no federal or state appellate decisions finding the Paraphilia NOS diagnosis was unreliable. *Id.* at 403-404.

The Daryl W. decision predated Jason C. and Kareem M., but a subsequent New York court expressly declined to follow those cases. In re Patrick L., 31 N.Y.S.2d 845 (2016). The Patrick L. court recognized the "'imperfect fit between the questions of ultimate concern to the law and the information contained in the DSM's clinical analysis,'" but found that holding the non-consent qualifier was unreliable simply because it was not accepted for publication in the DSM-V would "eviscerate both the purpose and the text of [the sexual predator statute]."[4] *Id.* at 854-855. The court also cited State v Harris, 12 N.Y.S.3d 950 (2015), which held that a diagnosis of Unspecified Paraphilic Disorder, with less exacting criteria, was generally accepted and admissible in civil commitment cases. *Id.* In affirming Patrick L.'s civil commitment, the court considered the expert's testimony regarding the factors she relied on in making the diagnosis,

[4]Significantly, the court noted both the Jason C. and Kareem M. decisions referenced the "'politics' of including non-consent as a paraphilia," particularly "a concern that doing so would diminish the criminality of rape because offenders could use the qualification as a mental health defense." *Id.* at 852. The fallacy of that concern is readily apparent. Other Specified Paraphilic Disorder (Biastophilia/Non-Consent) is no more the basis for a mental health defense in a criminal case than a diagnosis of Pedophilia serves as a basis for a criminal defense to sexual assault of a child.

which amply supported a finding that Patrick L. was still likely to reoffend sexually if released from confinement. *Id.*[5]

In addition to the New York cases discussed above, the federal courts and other state courts have confirmed the admissibility of a Paraphilia NOS, or Other Specified Paraphilic Disorder (Biatophilia/Non-Consent) diagnosis in civil commitment cases. In McGee v. Bartow, 593 F.3d 556 (7th Cir. 2010), the court discussed the validity of Paraphilia NOS and Personality Disorder NOS in a Wisconsin sexual predator proceeding, particularly in the context of the U.S. Supreme Court's analysis of due process requirements in sexually violent predator cases as set forth in Kansas v. Hendricks, 521 U.S. 346 (1997), and Kansas v. Crane, 534 U.S. 407 (2002). In holding both diagnoses were admissible, the court noted the DSM anticipated criticism of those categories by specifically noting the diversity of clinical presentations renders covering every possible situation impossible, and explaining the circumstances under which a NOS diagnosis would be appropriate. The court acknowledged the on-going debate in the mental health community regarding a non-consent diagnosis, but found the diagnosis was not so "unsupported by science that it should be excluded absolutely from consideration by the **trier of fact,**" and the existence of the debate is a proper consideration for "the **factfinder** in weighing the evidence" regarding a person's mental status. *Id.* at 577-581 (emphasis added).

By way of footnote, the court cited cases from other jurisdictions concluding that "a paraphilic rape disorder can be the predicate diagnosis, or one piece of predicate diagnosis." *Id.* at 581, n. 16. The footnote cites cases from the 9th Circuit Court of Appeals, Washington, Kansas,

[5]To date, the New York Court of Appeals has not ruled on the issue, and counsel can find no indication that court has accepted any of the trial court cases for review.

New Jersey, North Dakota, Illinois, Pennsylvania, Missouri, Florida and California. None of the cited cases have been modified or overruled.

In this case, Dr. Brown based his diagnoses and opinions on three years of reviewing Appellant's mental status since he was committed for treatment. As part of those reviews, Dr. Brown considered Appellant's legal history, disciplinary history while incarcerated, treatment records, and several interviews with Appellant. He testified Appellant's score on the Static-99R and Static-2002R put him in the high risk category (99th percentile) to reoffend as compared to other sex offenders, and Appellant had multiple dynamic risk factors for reoffending, including sexual preoccupation, preference for pubescent males, offensive support attitudes, lack of emotionally intimate relationships with adults, lifestyle impulsiveness, poor problem solving, and resistance to rules and supervision. He related those dynamic risk factors to Appellant's conduct while in the treatment program, including recent grooming type behavior toward younger residents that was very similar to Appellant's offense history. (TT, pp. 84-146; R., pp. 84-146).

The jury also heard Dr. Watson's testimony regarding the efficacy of Dr. Brown's Other Specified Paraphilic Disorder (Biastophilia/Non-Consent) diagnosis, and his opinion it was not a valid diagnosis.[6] He disputed the presence of the dynamic risk factors identified by Dr. Brown, but conceded there were discrepancies between Appellant's statements to him and the official records. Dr. Watson opined Appellant is safe to be at large, but recommended continued out-patient treatment. (TT, pp. 232-291; R., pp. 232-291).

As recognized in Snow, the SVPA only requires evidence of a mental abnormality or personality disorder, and does not define those terms or limit the State by restricting the type of

[6]Dr. Watson did not dispute the Antisocial Personality Disorder with Narcissistic Traits diagnosis.

mental abnormalities or personality disorders that may be used to satisfy the requirement, clearly indicating the legislative intent to leave to medical professionals the task of determining what is or is not a mental abnormality or personality disorder. 823 S.E.2d at 469. Citing Crane, the court noted that the presence of what the psychiatric profession itself classified as a serious mental disorder helps make the necessary distinction between sexually violent predators and other dangerous people. *Id.* As discussed above, the mental health profession has classified Other Specified Paraphilic Disorder as a serious mental disorder, and the Biastophilia/Non-Consent specifier has been recognized and widely used in civil commitment cases. Therefore, evidence of the disorder and specifier is admissible for SVPA purposes.

The circuit court properly determined the efficacy of Dr. Brown's Other Specified Paraphilic Disorder (Biastophilia/Non-Consent) diagnosis was subject to cross-examination, and ultimately presented a question for the jury as the factfinder. The court instructed the jury it could consider the expert opinions just like any other evidence, and give their testimony the weight it felt was deserved, including completely disregarding the expert's testimony. (TT, pp. 37-55, 226-228, 363-364; R., pp. 37-55, 226-228, 363-364).

The record amply supports the circuit court's ruling and the jury's verdict. Accordingly, Appellant's continued commitment in the Sexually Violent Predator Treatment Program should be affirmed.

## CONCLUSION

Based on the foregoing, the State respectfully submits the judgment of the circuit court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY: Deborah R.J. Shupe
Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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**CERTIFICATE OF COUNSEL**

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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."

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

BY: Deborah R.J. Shupe
Deborah R.J. Shupe

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