IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 082440

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

FRANKIE LEE SQUIRE,

Appellee.

COMMONWEALTH'S OPENING BRIEF

WILLIAM C. MIMS
Attorney General of Virginia

FRANCIS S. FERGUSON
Deputy Attorney General

PAMELA A. SARGENT
Senior Assistant Attorney General and Chief
Sexually Violent Predators Civil Commitment Section

*JOHN H. McLEES
Senior Assistant Attorney General
VSB # 15520

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 371-6016
Fax: (804) 786-9136
E-Mail: jmclees@oag.state.va.us

* Counsel of Record

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 2

QUESTIONS PRESENTED 2

STATEMENT OF FACTS 3

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES 13

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING SQUIRE WAS NOT LIKELY TO ENGAGE IN SEXUALLY VIOLENT ACTS, HAVING PREVIOUSLY FOUND SQUIRE HAS A MENTAL ABNORMALITY OR PERSONALTIY DISORDER AS DEFINED BY THE CODE OF VIRGINIA. 13

II. THE TRIAL COURT ERRONEOUSLY RULED THAT THE UNCONTROVERTED TESTIMONY OF TWO QUALIFIED EXPERTS, DR. NEVIN AND DR. NELSON, COUPLED WITH THE COMMONWEALTH'S EXHIBITS, FAILED TO ESTABLISH THAT SQUIRE IS A SEXUALLY VIOLENT PREDATOR. 19

CONCLUSION 21

CERTIFICATE 22

CASES

Beasley v. Molett,
95 S.W.3d 590 (Tex. App. 1992) 18

Commonwealth v. Miller,
273 Va. 540, 643 S.E.2d 208 (2007) 19

Early v. Mathena,
203 Va. 330, 124 S.E.2d 183 (1962) 19

In re Commitment of Bush,
699 N.W.2d 80 (Wis. 2005) 18

In re Commitment of P.Z.H.,
873 A.2d 595 (N.J. Super. Ct. App. Div. 2005) 18

In the Matter of Maricopa County Cause No. MH-90-00566,
840 P.2d 1042 (Ariz. App. 1992) 18

Kansas v. Crane,
534 U.S. 407 (2002) 15

People v. Felix,
169 Cal. App. 4th 607, 87 Cal. Rptr.3d 482
(Cal. Dist. App. 2008) 18

Shivaee v. Commonwealth,
270 Va. 112, 613 S.E.2d 570 (2005) 15, 16, 19

Westgate v. Richardson,
270 Va. 566, 621 S.E.2d 114 (2005) 15

OTHER AUTHORITIES

Rule 5:28, *Rules of the Supreme Court of Virginia* 22

Section 37.2-900, *Code of Virginia* 1, 14, 16, 17, 19

Section 37.2-908, *Code of Virginia* 13

Section 8.01-680, *Code of Virginia* 19

STATEMENT OF THE CASE

The Commonwealth appeals from the judgment of the Circuit Court of Greensville County dismissing the Commonwealth's Petition for Civil Commitment of a sexually violent predator.

On October 9, 2007, the Commonwealth filed a Petition to Civilly Commit Squire pursuant to the Civil Commitment of Sexually Violent Predators Act, Va. Code Ann. § 37.2-900 *et seq.* ("the Act"). On November 26, 2007, the trial court found probable cause to believe that Squire was an SVP.

A bench trial of this matter was conducted on September 15, 2008 before the Honorable W. Allan Sharrett. At the conclusion of trial, the court dismissed the Commonwealth's petition for civil commitment. The order reflecting the September 15, 2008 decision of the trial court was entered on September 24, 2008.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING SQUIRE WAS NOT LIKELY TO ENGAGE IN SEXUALLY VIOLENT ACTS, HAVING PREVIOUSLY FOUND SQUIRE HAS A MENTAL ABNORMALITY OR PERSONALITY DISORDER AS DEFINED BY THE CODE OF VIRGINIA.

II. THE TRIAL COURT ERRONEOUSLY RULED THAT THE UNCONTROVERTED TESTIMONY OF TWO QUALIFIED EXPERTS, DR. NEVIN AND DR. NELSON, COUPLED WITH THE COMMONWEALTH'S EXHIBITS, FAILED TO ESTABLISH THAT SQUIRE IS A SEXUALLY VIOLENT PREDATOR.

QUESTIONS PRESENTED

I. DOES A FINDING THAT A RESPONDENT HAS A MENTAL ABNORMALITY OR PERSONALITY DISORDER NECESSARILY INCLUDE A FINDING THA THE RESPONDENT IS SO LIKELY TO ENGAGE IN SEXUALLY VIOLENT OFFENSES THAT HE CONSTITUTES A MENACE TO THE HEALTH AND SAFETY OF OTHERS? (Assignment of Error # 1)

II. DID THE TRIAL COURT ERR IN FINDING THE EVIDENCE INSUFFICIENT TO SHOW SQUIRE WAS A SEXUALLY VIOLENT PREDATOR WHEN THE UNCONTRADICTED TESTIMONY OF TWO EXPERT WITNESSES WAS THAT HE MEETS THE CRITERIA AS A SEXUALLY VIOLENT PREDATOR? (Assignment of Error #2).

STATEMENT OF FACTS

At trial, the Commonwealth introduced a certified conviction from the trial court evidencing Squire's conviction of Rape. (A. 23-24).[1]

The Commonwealth called Dr. Doris Nevin, who had performed the mental health examination of Mr. Squire prescribed in Virginia Code § 37.2-904(B), and Dr. Evan Nelson, who had been appointed as an expert witness for the Respondent in accordance with Code § 37.2-907. Both witnesses were accepted by the trial court as experts in the diagnosis, treatment, and risk assessment of sex offenders. The mental health evaluation reports of both witnesses were accepted in evidence without objection.

In January 1995, Squire was convicted in Greensville County of a rape committed in 1994, and sentenced to fifteen years in prison with eight of those years suspended. (A. 24). His victim was a 45-year-old woman who, on February 4, 1994, was waiting outside a friend's home late at night. Squire grabbed her, pulled her into the bushes, and sat on top of her chest while she struggled. He produced a knife and raped her. (A. 11-12, 59-61). Squire testified at trial that he had consensual sexual intercourse

[1] This reference and other similar references in this brief, (A. ___), are to the Joint Appendix.

with the victim. (A. 12). In 2007 he told Dr. Nevin the same thing. (A. 32). He told Dr. Nelson, however, that the victim offered to trade sex with him for money, and he had consensual sex with her but had no money to pay her, so she falsely accused him of rape. (A. 61). Squire was 17 years old at the time of the rape, but was tried as an adult. (A. 16).

In 1990, when he was 14 years old, Squire had been charged, tried, and acquitted for rape in the Emporia Juvenile Court. (A. 36). In that case, the victim's statement to the police indicated that Squire was one of four boys who serially raped and/or digitally penetrated her while the others held her down in the woods. Squire claimed to Dr. Nelson that the charge was dismissed when the victim recanted in court and said she had had consensual sex with the boys. (A. 59).

In addition to the two rape charges, beginning at the age of fifteen, Squire acquired five misdemeanor convictions as a juvenile, including two for assault and battery. He had been sanctioned by the juvenile court on six occasions for probation violations. (A. 36-38). Squire also admitted to having been involved in fights in middle school, and having been suspended for them. (A. 55).

Squire was imprisoned on his 1995 rape conviction until 1999, when he was released on probation/parole. During that period of incarceration,

Squire incurred 26 institutional disciplinary infractions, five of which involved non-consensual sexual conduct in the form of deliberately exposing himself and masturbating in the presence of female staff members. Four of those were charged as indecent exposures and one as making sexual advances to another person. (A. 39-42, 53, 61).

In July 2003 he was arrested for a new offense, his probation was revoked, and a portion of his suspended time was imposed. The revocation was due to two convictions for assault and battery. One of these offenses was against his girlfriend's daughter. The other, which was originally charged as malicious wounding, was against a man who was dating a woman with whom Squire was dancing in a bar. Both offenses involved abuse of alcohol. (A. 56-58).

He was released again in 2004, and that period of release was terminated in 2006 because he had been living with a woman with children in violation of his conditions of release, and because he had been arrested for attempted breaking and entering. (A. 38, 58, 117).

Records and Squire's own reports indicated that he began drinking alcohol in his early teenage years, and was drinking heavily and showing signs of alcohol dependency later in his teenage years. (A. 30, 56). He reported that he had completed a 12-week alcohol treatment program while

on release in 2003. He also participated in substance abuse treatment in 2005, but records showed that he missed three group sessions in that treatment, and that he resumed drinking thereafter. By his own admission, he had been drinking alcohol before each of his crimes of conviction, and during his periods of supervised release. (A. 122-23). He denied, however, to Dr. Nevin that he was addicted to alcohol or that his drinking was a problem. (A. 30).

Squire claimed to have completed an outpatient sex offender treatment program while on probation in 2003. (A. 46). He admitted to Dr. Nevin, however, that his participation in the program had been brief. Records showed that the program consisted of nine group sessions, and that Squire missed two of them. (A. 118). Dr. Nevin was of the opinion that such a cursory exposure to treatment was insufficient to give a sex offender a good foundation in treatment, and that treatment generally takes between a year and one-half and five years to assist an offender in changing his or her thoughts and behaviors. (A. 118-19). She testified that despite the treatment, Squire showed no grasp of concepts taught in sex offender treatment: he denied having had anything other than voluntary sex; he denied having any fantasies about sexual activity; and he denied that his sexual prison infractions had been inappropriate conduct. (A. 112). Dr.

Nelson agreed that Squire showed no insight into his sex offending or impulse control problems. (A. 174).

In addition, Nevin testified that Squire still displayed distorted attitudes that tended to justify sexual offending: he regarded himself as a victim and failed to recognize his victimization of others; he rationalized his behaviors; he failed to demonstrate any degree of guilt or remorse; and he failed to show any significant level of empathy. (A. 47).

Dr. Nevin diagnosed Squire with exhibitionism, paraphilia not otherwise specified, alcohol dependence in remission in a controlled environment, antisocial personality disorder, and mild mental retardation. (A. 42-43, 124-25). Based on his score of 26 on the Hare Psychopathy Checklist Revised, Dr. Nevin also found that Squire displayed a high degree of psychopathy. A psychopathic personality is characterized by combinations of such attributes as pathological lying, superficial charm and glibness, poor behavioral controls, grandiose sense of self-worth, lack of remorse and empathy, shallow or callous affect, promiscuous sexual behavior, conning and manipulation, and criminal versatility. (A. 45). She testified that "with Mr. Squire, we have an individual who has a high degree of psychopathy fueled with the anti-social personality disorder which makes

his risk more prevalent than the average person, even if [sic] the average person having a Static score of six or above." (A. 160).

Dr. Nevin explained that her diagnosis of "paraphilia not otherwise specified" was a mental disorder consisting of recurring deviant sexual arousals and behaviors over more than a six-month period of time involving non-consenting sex. (A. 43, 124-25). This was based on Squire's 1995 conviction for rape and the 1990 charge of rape, for which there had been a substantial accusation that went to trial, even though he was ultimately acquitted. (A. 43, 108-12).

Dr. Nelson diagnosed Squire with exhibitionism, alcohol abuse in remission in a controlled environment, antisocial personality disorder, and borderline mental retardation. (A. 64). Dr. Nelson concluded that he could not diagnose Squire with "paraphilia not otherwise specified" because of the unclarities about the non-consensual aspect of the 1990 incident, and because it was not clear that Squire had taken pleasure from the non-consensual aspect of the 1994 rape. (A. 66).

Both experts agreed, however, that Squire displays antisocial personality disorder. These conclusions were based on his long history of criminal behavior and violating the rights of others. (A. 66, 171-72). Further, both experts agreed that because of his mental abnormalities and

personality disorders, Squire is likely to commit sexually violent offenses in the future. (A. 48 ("high probability of sexually violent recidivism"), 66, 141)).

Dr. Nevin administered two actuarial risk assessment instruments, the Static-99 and the Violence Risk Appraisal Guide ("VRAG"). She testified that on the Static-99, Squire received a score of six (6), which is in the highest category for risk of reoffending and translates to a statistical likelihood of recidivism of 39% within five (5) years, 45% within ten (10) years, and 52% within fifteen (15) years. (A. 134). On the VRAG, Squire scored a plus sixteen (+16) which is in the moderate high range and translates into a 55% probability of a violent offense within seven (7) years and 64% within ten (10) years. (A. 137).

Dr. Nelson testified that on his scoring of the Static-99, Squire received a score of either five (5) or seven (7), depending on how one applied the test factors to Squire's history. (A. 62-64, 187). A score of five (5) translates to a risk of recidivism of 33% within five (5) years. (A. 187). Dr. Nelson stated that "...anybody with four points, five points, six points or more, that these are functionally the same. These are the higher risk offenders relative to others." (A. 187).

Dr. Nelson also administered to Squire the Sex Offense Risk Assessment Guide ("SORAG"). On the SORAG, Squire's score placed him in the sixth highest of nine risk categories. (A. 189). Dr. Nelson then testified "...the message on an entirely different tool with a different set of sex offenders is the same, which is that he is in a group with a lot of risk factors that places him at more risk for sex offending than your average sex offender." (A. 190).

Both experts went beyond the use of actuarial risk assessment instruments and considered Squire's individual history, thoughts and behaviors. Dr. Nevin specifically referred to Squire's not having completed a thorough sex offender treatment program, non-compliance with supervision, sexual deviance, self-regulation problems, substance abuse, and distorted attitudes that justify sex offending. (A. 138-40).

Dr. Nelson, focusing on Squire's individual risk factors, stated that the younger an individual is when a sex offense appears on their records, the higher their risk of new offense behavior. (A. 170). He testified that people with probation and parole violations in the past are at a higher risk for new sex offenses. (A. 173). Having diagnosed Squire with Alcohol Abuse in remission in a controlled environment, he opined that when Squire is under

the influence of alcohol, his risk of sex offenses increases "dramatically." (A. 175).

The Court repeatedly questioned both experts as to the import of the fact that Squire had not had any convictions or institutional infractions for sex offenses since 1999 (A. 151, 200-09), characterizing this issue as "the Court's biggest concern" (A.157), "the nub of the Court's concern" (A. 162), and "what the Court struggles with." (A. 200). Repeatedly, both Dr. Nevin and Dr. Nelson responded that Squire's other convictions for violent and non-violent crimes, especially involving alcohol abuse, showed he still had serious difficulties in controlling his behavior (A. 158, 209), that those difficulties still presented a future risk for violent sex offending (A. 162, 201), that good behavior in prison was not strongly predictive of good behavior in the community (A. 179-80, 191), and that the long proportion of Squire's life over which the sexual incidents had occurred indicated that the recent ten years of lack of sex offending while Squire was in and out of prison did not indicate a lack of risk of reoffense. (A. 209).

Dr. Nevin explained that even when an individual has behaved well while incarcerated, he "...may then experience difficulties once they're released into the community because they do not have the level of structure in terms of what they can and cannot do." (A. 115).

The trial court recognized that Squire had consistently failed to keep the peace and be of good behavior while in the community. (A. 236-37). Dr. Nevin testified that an individual who does not comply with community supervision is at a higher risk for sexual or violent reoffense. (A. 117).

Dr. Nelson testified that the only events that would substantially reduce Squire's risk of sexual reoffense would be either his passing the age of 60 (Squire was 32 years old at the time of trial), or his receiving an adequate course of treatment, followed up by adequate supervision in the community. (A. 203). It was his opinion that Squire would always need at least periodic follow-up mental health treatment assessments. (A. 208).

Among the Court's remarks in voicing its ruling were the following:

> The Court has likewise looked at the law, because it is ultimately the law by which it is bound. And the Court notes the following: ***There's no question that the defendant has been convicted of a sexually violent offense. There is no question in the Court's mind that he has a mental abnormality or a personality disorder. And there's no question in the Court's mind that that makes it difficult for him to control his predatory behavior.***

(A. 234, emphasis added).

> But I am confronted with this fact that I cannot get away from, that the defendant has been at large in the community, either at large or incarcerated over the last nine years. In 1999 to 2003, a period of approximately four years, and from 2004 to 2006, a period of two years, within a month, so for almost six years he's been at large

> in the community. During that time he has not kept the peace and been of good behavior. He has violated the law. He's shown himself not amenable to treatment, but he has not sexually reoffended either by charge, conviction, or institutional infraction. And when the Court looks at that conduct of the defendant, while it is not at all confident or even hopeful that the defendant will remain away from this Court for the duration of his life, it simply cannot say that it is convinced that he will probably reoffend sexually.
>
> That being the case, ***that being the standard of proof that's required, the Court has no alternative, though it wishes it did, it doesn't, but to, albeit it [sic] reluctantly*** nonetheless, dismiss the petition against the defendant.

(A. 236-37, emphasis added).

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING SQUIRE WAS NOT LIKELY TO ENGAGE IN SEXUALLY VIOLENT ACTS, HAVING PREVIOUSLY FOUND SQUIRE HAS A MENTAL ABNORMALITY OR PERSONALTIY DISORDER AS DEFINED BY THE CODE OF VIRGINIA.

Pursuant to Code § 37.2-908, at the trial of an SVP Petition, the Court is required to determine whether by clear and convincing evidence the Respondent meets the criteria as a sexually violent predator. For purposes of discussions regarding Squire, an SVP is an individual that "(i) has been

convicted of a sexually violent offense... and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts." Since the Act's inception, at Code § 37.2-900, the terms "mental abnormality or personality disorder" have been defined as "...a congenital or acquired condition that affects a person's emotional or volitional capacity and ***renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health a safety of others***." Code § 37.2-900 (emphasis added).

After the presentation of the evidence, the trial court reviewed the Act and made the following determinations:

> There's no question that the defendant has been convicted of a sexually violent offense. There is no question in the Court's mind that he has a mental abnormality or personality disorder. And there is no question in the Court's mind that that makes it difficult for him to control his predatory behavior.

(A. 234).

The trial court then proceeded to determine that Mr. Squire is not likely to engage in sexually violent acts and dismissed the Commonwealth's Petition. (A. 237). In doing so, the trial court contradicted itself as a matter of law. Errors of law are reviewed *de novo*

by this Court. Westgate v. Richardson, 270 Va. 566, 574; 621 S.E.2d 114, 118 (2005).

By finding Squire has the requisite mental abnormality or personality disorder as defined in the Code, the trial court had necessarily found that Squire is "so likely to engage in sexually violent offenses that he constitutes a menace to the health and safety of others."

This Court considered the language of the Act in Shivaee v. Commonwealth, 270 Va. 112, 124-125; 613 S.E.2d 570, 577 (2005) and interpreted the definition of mental abnormality or personality disorder and how the definition relates to a finding that an individual is an SVP. The Court first determined that mental abnormality or personality disorder in the Act "...includes a causal link between the condition and the potential consequences of the condition, namely, lack of control and dangerousness." *Id.* The Court also found that mental abnormality or personality disorder as defined in the Code "focuses on 'the person' whose commitment is at issue." *Id.* These findings satisfied the United States Supreme Court requirements, mandated in Kansas v. Crane, 534 U.S. 407 (2002), that civil commitment statutes include dangerousness to one's self or others and that the dangerousness be linked to the mental abnormality or personality disorder displayed in the person subject to commitment.

Then this Court determined that when the definition of mental abnormality or personality disorder is read in context with the definition of an SVP, the definition of mental abnormality or personality disorder is the controlling finding that a court must make and which would elevate a respondent to the status of an SVP.

> Because a finding that the person is a sexually violent predator includes the predicate finding of a 'mental abnormality or personality disorder', a fortiori, the determination requires, first, the finding of a condition affecting emotional or volitional capacity and, second, the finding that the particular person subject to commitment is rendered by that condition 'so likely to commit sexually violent offenses' that he is dangerous.

Shivaee, 270 Va. at 124-125, 613 S.E.2d at 577.

By finding that Squire has a mental abnormality or personality disorder, the trial court necessarily found that Squire is "so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others." Code § 37.2-900. It was therefore contradictory after this finding for the trial court to determine that he is not likely to engage in sexually violent acts.

This Court's teaching in Shivaee supports this interpretation. "While the additional language in the definition of sexually violent predator ('finds it difficult to control his predatory behavior which makes him likely to engage in sexually violent acts') ***may be redundant***, its meaning in context of other

definitions in the SVPA is not unclear. (Emphasis added). *Id.* Additionally, when the trial court found that there was "no question" that Squire had the requisite mental abnormality or personality disorder, it necesarily found Squire dangerous to the point that "...he constitutes a menace to the health and safety of others." Code § 37.2-900.

The trial court ruled there was "no question" that Squire has the requisite mental abnormality or personality disorder as defined by the Code. Once the trial court made that finding, it determined, by definition, that Squire is "so likely" to commit sexually violent offenses that he constitutes a menace to the health and safety of others." It was therefore contradictory, and an error of law, for the trial court to then rule Squire is not likely to engage in sexually violent acts.

Some light on how the Court may have arrived at this contradictory conclusion may be shed from considering its remarks during questioning and during the explanation of its decision. It appears that the trial court was imposing on the definition of "sexually violent predator" an additional and erroneous requirement that the Commonwealth, in order to prove risk due to likelihood of reoffense, must prove that the Respondent has committed a recent overt act of criminal sexual misbehavior. The imposition of such a requirement is apparently what led the Court to

conclude that, despite its belief that Squire has a mental abnormality or a personality disorder which makes it difficult for him to control his predatory behavior (A. 234), it had no alternative but to dismiss the petition, although it wished it did, and was reluctant in doing so. (A. 236-37).

The requirement of proof of a recent overt act of sexual crime is nowhere to be found in the Virginia statute. The majority of civil commitment cases from other jurisdictions to consider this issue have held that, where there is no statutory requirement of proof of a recent overt act, such requirement should not be read into the law and is not constitutionally mandated. See In the Matter of Maricopa County Cause No. MH-90-00566, 840 P.2d 1042, (Ariz. App. 1992); People v. Felix, 169 Cal. App. 4th 607, 618, 87 Cal. Rptr.3d 482, 489 (Cal. Dist. App. 2008); In re Commitment of P.Z.H., 873 A.2d 595, 599 (N.J. Super. Ct. App. Div. 2005); Beasley v. Molett, 95 S.W.3d 590, 599 (Tex. App. 1992); In re Commitment of Bush, 699 N.W.2d 80, 92 (Wis. 2005). The "recent overt act" requirement should not be read into the Virginia statute either, and the trial court's self-contradictory ruling should be reversed.

II. THE TRIAL COURT ERRONEOUSLY RULED THAT THE UNCONTROVERTED TESTIMONY OF TWO QUALIFIED EXPERTS, DR. NEVIN AND DR. NELSON, COUPLED WITH THE COMMONWEALTH'S EXHIBITS, FAILED TO ESTABLISH THAT SQUIRE IS A SEXUALLY VIOLENT PREDATOR.

Pursuant to Code § 8.01-680, this Court will review a sufficiency of the evidence argument to determine whether the trial court's decision is plainly wrong or without evidence to support it. See also Shivaee v. Commonwealth, 270 Va. 112, 613 S.E.2d 570 (2005). This Court has interpreted this standard to mean that when a verdict is plainly wrong "..it should be set aside even it if is supported by some evidence." Early v. Mathena, 203 Va. 330, 334; 124 S.E.2d 183, 187 (1962). The evidence is viewed in the light most favorable to the prevailing party below and that party will receive the benefit of all inferences fairly deducible from the evidence. Shivaee, 270 Va. at 127. However, when the evidence, as a matter of law, provides clear and convincing proof that the Respondent is a sexually violent predator, this Court will reverse a dismissal of the Commonwealth's petition and enter judgment that a Respondent is a sexually violent predator. Commonwealth v. Miller, 273 Va. 540, 552-53, 643 S.E.2d 208, 215-16 (2007). The case presented here falls within the

Court's duty to set aside the trial court's erroneous judgment and rule that the Respondent is a sexually violent predator as a matter of law.

The ***only*** evidence presented at the trial of this matter was the uncontradicted testimony of two witnesses accepted as experts in the diagnosis, treatment, and risk assessment of sex offenders. They both diagnosed Squire with a mental abnormality and/or a personality disorder. They both testified extensively regarding Squire's risk level based on actuarial instruments and his prior behavior.

Moreover, on the issue the Court regarded as the "nub" of the case, both doctors testified as to why the absence of a recent overt act of sexual crime does not mean that Squire is not a danger to the public for sexual reoffending.

The trial court expressly concluded that Squire has a mental abnormality or a personality disorder which makes it difficult for him to control his predatory behavior (A. 234), but it then reluctantly concluded that it "had no alternative" but to dismiss the petition based on the fact that Squire had not been charged, convicted, or accused of sex-offending behavior since his last institutional infraction of a sexual nature in 1999. (A. 236-37). That "reluctant" conclusion was wrong as a matter of law and without evidence to support it.

Based on the overwhelming and uncontradicted evidence, the only reasonable conclusion that can be reached is that Squire is a sexually violent predator.

CONCLUSION

For all of these reasons, this Court should reverse the trial court's decision, enter judgment in favor of the Commonwealth finding that Squire is a sexually violent predator, and remand the case for a determination of whether Squire should be civilly committed or conditionally released as an SVP.

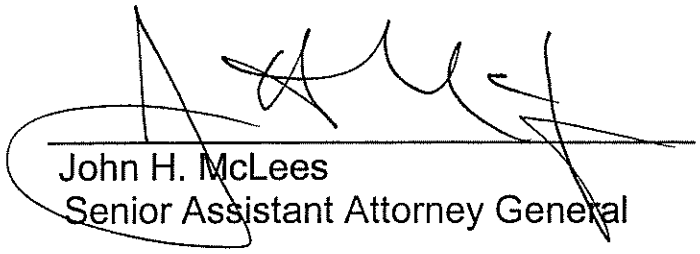
RESPECTFULLY SUBMITTED,
COMMONWEALTH OF VIRGINIA

BY: _____
Counsel

John H. McLees
Senior Assistant Attorney General
Sexually Violent Predators Civil Commitment Section
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Tel: (804) 371-6016
Fax: (804) 786-9136
E-mail: jmclees@oag.state.va.us
VSB#: 15520

CERTIFICATE

Pursuant to Rule 5:28 of the Supreme Court of Virginia, I hereby certify that on this 18TH day of May, 2009, I caused twelve paper copies and one electronic copy of this brief to be filed with the Court, and caused three copies of this brief to be mailed by first class mail to the office of Alvin A. Lockerman, Jr. Esquire, Outten, Barrett & Whitby, P.O. Box 232, Emporia, VA 23847-0232.



John H. McLees
Senior Assistant Attorney General