SEALED

IN THE

Supreme Court of Virginia

RECORD NO. 091119

STEVEN LAWRENCE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Michael F. Devine (VSB No. 30490)
DEVINE, CONNELL,
SHELDON & FLOOD, PLC
10621 Jones Street
Suite 301-A
Fairfax, Virginia 22030
(703) 691-8410
(703) 251-0757 (Fax)
MFDESQ@DevineConnell.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case	1
Assignments of Error	3
Questions Presented	3
Statement of the Facts	3
Argument	
I. The trial court erred in admitting Dr. Gravers' testimony of the details of unadjudicated allegations of sexual misconduct by Lawrence obtained from police reports because the testimony was hearsay and was unduly prejudicial.	7
II. The trial court erred in admitting Dr. Gravers' opinion testimony because it was based upon police reports concerning unadjudicated acts of sexual misconduct which are unreliable as a matter of law.	17
Conclusion	22
Certificate	23

TABLE OF AUTHORITIES

Cases **Page**

Caison v. Commonwealth, 52 Va. App. 423,
663 S.E.2d 553 (2008) 8

Donahue v. Commonwealth, 225 Va. 145,
300 S.E.2d 768 (1983) . . . . . 13 - 14

Ellison v. Commonwealth, 273 Va. 254,
639 S.E.2d 209 (2007) 18

Garrett v. Commonwealth, 276 Va. 590,
667 S.E.2d 739, (2008) . . . . . *passim*

John v. Im, 263 Va. 315,
559 S.E.2d 694, 696 (2002) 7

Lynchburg Division of Social Services v. Cook, 276 Va. 465,
666 S.E.2d 361, 370 (2008) 8

Norfolk & Western Ry. Co. v. Puryear, 250 Va. 559,
463 S.E.2d 442 (1995) 7

Robinson v. Commonwealth, 258 Va. 3,
518 S.E.2d 475, 476 (1999) 8

Stevenson v. Commonwealth, 218 Va. 462,
237 S.E.2d 779, 781 (1977) 8, 13

Wynn v. Commonwealth, 277 Va. 92,
671 S.E.2d 137 (2009) . . . . . *passim*

Statutes

Virginia Code § 8.01-401.1 9

TABLE OF AUTHORITIES
(cont'd)

Statutes **Page**

Virginia Code § 37.2-900 14

STATEMENT OF THE CASE

Appellant Steven Lawrence was determined to be a sexually violent predator pursuant to the Sexual Violent Predator Act, Virginia Code § 37.2-900 *et seq.* ("SVPA" or "the Act"), after a jury trial in the Circuit Court of Fairfax County before the Honorable Randy I. Bellows. After a subsequent hearing, Judge Bellows ordered that Lawrence be committed indefinitely to the Department of Mental Health, Mental Retardation and Substance Abuse Services.

At trial, the Commonwealth presented testimony from Ilona Gravers, one of two clinical psychologists who independently evaluated Lawrence. During direct examination, the Commonwealth asked Dr. Gravers to recite the details of unadjudiated allegations of sexual misconduct by Lawrence which she learned from police reports and upon which her opinions were partly based. Joint Appendix ("JA") at 78-115. Lawrence objected to this evidence on the ground that the testimony constituted hearsay (JA at 90[1], 100, 111), and that any probative value was outweighed by undue prejudice. JA at 111. The Commonwealth argued that Code § 8.01-401.1 authorized the admission of hearsay (JA at 90-93), and that the testimony was not hearsay because it

---

[1] As the Commonwealth succinctly stated, "One issue is her relying on [the hearsay] and one issue is her testifying to it." Tr. 12/2 at 90.

was not offered for the truth of the allegations but only to show the basis for the expert's opinion (JA at 98). The trial court overruled Lawrence's objection and admitted the testimony with a cautionary instruction that the testimony "was not offered to prove that the behavior actually occurred, but only the basis for the expert's opinion." JA at 116.

The Commonwealth also offered Dr. Gravers' opinion testimony that Lawrence had a mental abnormality (paraphilia) and a personality disorder, and therefore he presented a high risk of committing future non-consensual sexual acts. Those opinions were based, in part, on facts Dr. Gravers learned from the police reports relating to the unadjudicated allegations of sexual misconduct by Lawrence. Lawrence objected to admission of Dr. Gravers' opinion testimony on the ground that her opinions were based upon unreliable facts and thus inadmissible pursuant to *Commonwealth v. Garrett*, 276 Va. 590, 607, 667 S.E.2d 739, 749 (2008). JA at 78-112. The Commonwealth argued that police reports provided a sufficiently reliable factual basis for an expert opinion. JA at 81-83.

ASSIGNMENTS OF ERROR

I. The trial court erred in admitting Dr. Gravers' testimony of the details of allegations of unadjudicated sexual misconduct by Lawrence obtained from police reports because the testimony was hearsay and unduly prejudicial.

II. The trial court erred in admitting Dr. Gravers' opinion testimony because it was based upon police reports concerning unadjudicated acts of sexual misconduct which are unreliable as a matter of law.

QUESTIONS PRESENTED

I. Did the trial court err in admitting Dr. Gravers' testimony of the details of allegations of sexual misconduct by Lawrence obtained from police reports holding that such was not hearsay or unduly prejudicial? (This question relates to Assignment of Error I.)

II. Did the trial court err in admitting Dr. Gravers' opinion testimony, which was based upon police reports concerning unadjudicated acts of sexual misconduct, holding that the opinion had a reliable factual basis? (This question relates to Assignment of Error II.)

STATEMENT OF THE FACTS

In 1989, Steven Lawrence was convicted in Fairfax County Circuit Court of rape, forcible sodomy and robbery. He was sentenced to 58 years in prison with 5 years suspended. In December 2007, several months before Lawrence's scheduled release, the Commonwealth filed a petition seeking his civil commitment as a sexually violent predator. JA at 1.

Ilona Gravers, a psychologist, evaluated Lawrence on behalf of the Commonwealth. JA at 69. Dr. Gravers found that Lawrence had a mental abnormality of Paraphilia Not Otherwise Specified ("NOS") and Personality Disorder NOS with Antisocial Traits. JA at 138-41. As a result, Dr. Gravers testified, Lawrence presented a high risk of committing future non-consensual sexual acts. JA at 158-59.

Dr. Gravers relied in part upon police reports dating from 1975 to 1988 in conducting her evaluation and in formulating her opinions. JA at 166-68. Several reports pertained to incidents for which dispositions were unknown or Lawrence was not prosecuted.[2] The Commonwealth elicited testimony from Dr. Gravers during her direct examination regarding the specific facts of the allegations obtained from the police reports.

Dr. Gravers testified that one police report stated that Lawrence was pimping a woman as a prostitute and that Lawrence would cut her arms or

---

[2] These unadjudicated offenses are as follows:

Date	Alleged Offense
10/18/75	Rape
08/21/86	Possession of a sawed off shotgun
07/11/87	Consorting with a prostitute
10/20/87	Robbery with firearm
06/21/88	Pandering

burn her with a cigarette if she did not make enough money. JA at 119. Dr. Gravers testified that another report stated that Lawrence brandished a shotgun when his girlfriend's cousin refused to have sex with Lawrence and his girlfriend. *Id.*

Dr. Gravers also testified that a 1975 police report regarding Lawrence's arrest for rape stated that the alleged victim was 15 years old and that Lawrence offered to give her a ride home from a football game. On the way home, the girl fought off Lawrence's advances and got out of the car. The girl got back in the car at Lawrence's request, and they drove to another area where Lawrence forcibly disrobed her. The girl later told police that she could not tell whether Lawrence actually had intercourse with her or not. JA at 123. Lawrence denied any wrongdoing with regard to these incidents during the evaluation by Dr. Gravers. JA at 121, 123.

Dr. Gravers also relied upon and testified about the facts of offenses for which Lawrence had been tried and convicted. JA at 124-26. Dr. Gravers obtained the facts of these offenses from police reports and the pre-sentence investigation report from the 1989 offense. JA at 126. Dr. Gravers testified that that these reports "affected" her opinions, JA at 178, and "the case formulation in understanding Mr. Lawrence[.]" JA at 165.

Ronald Boggio, a psychologist, also evaluated Lawrence. Dr. Boggio likewise diagnosed Lawrence as having a mental abnormality of Paraphilia NOS - Sex with Non-Consenting Parties. JA at 222. Dr. Boggio did not diagnose Lawrence as having a personality disorder, but did note Lawrence exhibited antisocial traits. JA at 223. According to Dr. Boggio, Lawrence's paraphilia predisposes him to engage in sexual assaultive behavior, and that "he is a very high risk for future sexual offending." JA at 224, 230.

ARGUMENT

I. The trial court erred in admitting Dr. Gravers' testimony of the details of unadjudicated allegations of sexual misconduct by Lawrence obtained from police reports because the testimony was hearsay and unduly prejudicial.

This Court's decision in *Wynn v. Commonwealth*, 277 Va. 92, 671 S.E.2d 137 (2009) should inform, if not control, the resolution of this issue. In *Wynn*, the Court rejected the identical arguments advanced by the Commonwealth in support of the admission of the same type of hearsay testimony. The Court should reach the same conclusion here and hold that the evidence was admitted improperly.

A. The testimony about the facts obtained from the police reports is inadmissible as hearsay.

1. Standard of Review

Generally, a circuit court's evidentiary rulings are reviewed under an abuse of discretion standard. *John v. Im*, 263 Va. 315, 320, 559 S.E.2d 694, 696 (2002). However, a circuit court has no discretion to admit evidence that is clearly inadmissible. *Norfolk & Western Ry. Co. v. Puryear*, 250 Va. 559, 563, 463 S.E.2d 442, 444 (1995). "Evidence that is hearsay and does not fall under an exception is clearly inadmissible." *Wynn v. Commonwealth*, 277 Va.

at 98, 671 S.E.2d at 139. "A court by definition abuses its discretion when it makes an error of law . . ." *Lynchburg Division of Social Services v. Cook*, 276 Va. 465, 484, 666 S.E.2d 361, 370 (2008) (citations and internal quotation marks omitted). Whether certain evidence is or is not hearsay is a question of law that is reviewed *de novo*. *Caison v. Commonwealth*, 52 Va. App. 423, 434, 663 S.E.2d 553, 559 (2008).

Applying these principles, the Court should review *de novo* the Circuit Court's determination that the evidence was not hearsay. If the Court finds that the evidence was hearsay, the Court should find that the Circuit Court abused its discretion in admitting the evidence.

2. The testimony was hearsay and not admissible under any exception.

Hearsay is an out of court statement offered in court for the truth of the matter asserted. *Robinson v. Commonwealth*, 258 Va. 3, 6, 518 S.E.2d 475, 476 (1999). "[H]earsay includes testimony by a witness who relates not what he knows personally but what others have told him or what he has read." *Id.* Consequently, the value of such testimony rests on the credibility of the out of court asserter. *Stevenson v. Commonwealth*, 218 Va. 462, 464-65,237 S.E.2d 779, 781 (1977).

Dr. Gravers learned of the details of unadjudicated allegations of Lawrence's sexual misconduct by reading police reports. Thus testimony regarding the details of Lawrence's prior unadjudicated misconduct is hearsay if admitted for the truth of those allegations.[3] As the Court observed in *Wynn*, the SVPA "contains no express provisions allowing the admission of hearsay evidence during an expert witnesses' testimony at a SVPA trial." *Wynn v. Commonwealth*, 277 Va. at 98, 671 S.E.2d at 140. Consequently, the general rules applicable to expert testimony in other civil cases applies. *Id.*

Wynn rejects the arguments made by the Commonwealth at Lawrence's trial for admission of the testimony about the details of the unadjudicated allegations of his sexual misconduct. As in *Wynn*, the Commonwealth argued at Lawrence's trial that the testimony was admissible under Virginia Code § 8.01-401.1[4] to show the basis of Dr. Gravers' opinion. *Wynn* holds that

---

[3] Dr. Gravers' testimony about the details of the offenses for which Lawrence was convicted also would be inadmissible hearsay. The Court need not address this testimony because Lawrence's objection was limited to testimony regarding unadjudicated acts.

[4] Code Section 8.01-401.1 reads in relevant part as follows:

8.01-401.1 Opinion testimony by experts; hearsay exception
In any civil action any expert witness may give testimony and render

neither this code section nor Code § 37.2-908(C)[5] "allows for the introduction of otherwise inadmissible hearsay evidence during the direct examination of an expert witness merely because the expert relied on the hearsay information in formulating an opinion." *Wynn v. Commonwealth*, 277 Va. at 100, 671 S.E.2d at 141.

There being no hearsay exception that authorizes admission of the testimony, the Commonwealth argued at Lawrence's trial that the testimony was not hearsay because it was not offered to establish the truth of the allegations, but merely to explain the basis of Dr. Gravers' opinion so the jury

---

> an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
>
> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

[5] Code Section 37.2-908(C) states in relevant part: "any expert witness may be permitted to testify at the trial as to his diagnosis, his opinion as to whether the respondent meets the definition of a sexually violent predator, his recommendation as to treatment, and the basis for his opinions."

could weigh that opinion appropriately. The Court considered this identical argument in *Wynn* and rejected it. The Court should reach the same conclusion here.

In *Wynn*, the Commonwealth argued that details of unadjudicated allegations of sexual misconduct were admissible in a SVPA trial because "... (5) the allegations were not hearsay because they were not offered for the truth of the matter asserted but to show the factual basis for [the expert]'s opinions. . . ." *Id.* at 99, 671 S.E.2d at 140. The Court rejected this as a basis for admission of the testimony, stating "We do not agree with any aspect of the Commonwealth's position." *Id.*

In rejecting the claim that the evidence was not hearsay, the Court explained: "Whether an expert relies upon the opinions of others or allegations of sexual misconduct in formulating an opinion, both constitute hearsay. While certain information may be of the type routinely used by experts in a given field of expertise when formulating their opinions, a litigant, nevertheless, should not be required to contend with such hearsay information because the trier of fact cannot observe the demeanor of the speaker and the statements cannot be tested by cross-examination." *Id.* at 100, 671 S.E.2d at 141. "Even though [the expert] relied on those allegations

in formulating his opinions, the information came from sources unavailable for cross-examination. The evidence fell within the realm of hearsay and was, therefore, inadmissible." *Id.* at 102, 671 S.E.2d at 142.

3. The cautionary instruction does not render otherwise inadmissible evidence admissible.

The Court noted in *Wynn* that at no time during Wynn's trial in the circuit court did the Commonwealth suggest that the testimony was offered for anything other than the truth of the matter asserted. *Id.* at 99, 671 S.E.2d at 140. In contrast, at Lawrence's trial the Circuit Court instructed the jury that the testimony "was not offered to prove that the behavior actually occurred, but only the basis for the expert's opinion." JA at 116.

a. The testimony is hearsay because its value depends on the truth of the allegations.

The instruction is insufficient to render the testimony admissible as non-hearsay because the value of the testimony – even for the limited purpose of explaining the basis of Dr. Gravers' opinions – nevertheless depends upon the truth of those allegations. Dr. Gravers' opinions are based not on the fact that these unadjudicated allegations were made without regard to their truth or falsity. Rather, Dr. Gravers bases her opinion on these allegations

because she believed them to be true. Consequently, "the value of such testimony rests on the credibility of the out of court asserter[s,]" and the testimony is hearsay. *See Stevenson v. Commonwealth*, 218 Va. at 464-65,237 S.E.2d at 781; *Donahue v. Commonwealth*, 225 Va. 145, 151-52, 300 S.E.2d 768, 771-772 (1983).

In *Donahue*, the defendant was indicted for possession with the intent to distribute marijuana and PCP. Over Donahue's hearsay objection, the circuit court admitted a handwritten note written by Donahue's husband alluding to a drug sale and found in Donahue's bedroom. *Id.* at 148, 151, 300 S.E.2d at 769, 771. This Court reversed, rejecting the trial court's conclusion that "the note was not hearsay because it was being offered simply to prove the fact of utterance, a 'verbal act.'" *Id.* at 151, 300 S.E.2d at 771.

First, the Court reviewed *de novo* whether the note constituted hearsay. *Id.* at 152, 300 S.E.2d at 771 ("Our analysis must begin with a consideration whether the handwritten note . . . is in fact hearsay."). The Court did not defer to the trial court's finding that the evidence was not hearsay. Upon a review of the trial record, the Court concluded that "the note was introduced and used by the Commonwealth to prove the truth of its contents . . . .[and] there is no merit to the Attorney General's claim that the note was introduced solely

to show that it was uttered *without regard to its truth or falsity*." *Id.* at 152, 300 S.E.2d at 772 (emphasis added). Finding that the evidence was not admissible pursuant to any exception to the hearsay rule, the conviction was reversed. *Id.* at 153-54, 300 S.E.2d at 772-773.

The Court should apply the same analysis in evaluating the admissibility of Dr. Gravers' testimony. Dr. Gravers' testified that her opinions were based upon the truth of the allegations of Lawrence's sexual misconduct, rather than the mere fact that allegations had been made against him. Specifically, Dr. Gravers relied on the police reports in concluding that Lawrence had intimacy deficits and a pattern of disordered thinking, and in diagnosing him with the mental defect JA at 77-78, 118-19, 174 -75. Dr. Gravers also relied upon the reports of unadjudicated sexual misconduct to diagnose Lawrence as having the mental abnormality of Paraphilia NOS and a personality disorder,[6] and admitted that the reports "affected" her opinion. JA at 137-38, 168.

Dr. Gravers did not make these allegations a basis for her opinion "without regard to [their] truth or falsity." Dr. Gravers relied upon the

---

[6] The existence of a mental abnormality or personality disorder is one of the essential elements that the Commonwealth must prove in order to commit Lawrence as a sexually violent predator. Virginia Code § 37.2-900.

allegations because she believed them to be true. To determine the weight to be accorded to Dr. Gravers' testimony, the jury would need to evaluate the credibility of the out of court asserters. Dr. Gravers' testimony regarding the allegations thus remains inadmissible hearsay.

As the Court stated in *Wynn*, "a litigant, nevertheless, should not be required to contend with such hearsay information because the trier of fact cannot observe the demeanor of the speaker and the statements cannot be tested by cross-examination." *Id.* at 100, 671 S.E.2d at 141.

b. The instruction compounds the error by inviting the jury to give weight to evidence that is unreliable as a matter of law.

In *Garrett v. Commonwealth*, 276 Va. 590, 606, 667 S.E.2d 739, 748 (2008), the Court held that, in an SVP case, a psychologist's opinion that was based upon accusations of wrongdoing that were not the subject of sworn testimony before the trier of fact was *"unreliable as a matter of law."* (Emphasis added.) The instruction in Lawrence's case, however, directs the jury to consider *this very type of unreliable evidence* in determining the weight to be given to Dr. Gravers' testimony. Instead, the jury should have been instructed that as a matter of law this evidence adds nothing to – and actually

may detract from – the weight to be accorded the expert's opinion. The trial court erred in admitting Dr. Gravers' testimony regarding the facts of unadjudicated allegations of sexual misconduct obtained from police reports, and the cautionary instruction merely compounded the error.

4. The probative value of the evidence is outweighed by the prejudicial effect.

Even if the testimony of the details of the unadjudicated allegations against Lawrence were admissible as non-hearsay, the probative value of the evidence was outweighed by its unfair prejudice. No probative value can be ascribed to police reports about misconduct for which Lawrence was not prosecuted or convicted, particularly when, as here, there is no explanation for the government's decision not to prosecute. *See Garrett v. Commonwealth*, 276 Va. at 606, 667 S.E.2d at 748-49 ("no legal significance can be attached to the fact that [a] charge was brought" and dismissed).

The unadjudicated allegations about which Dr. Gravers testified included inflammatory descriptions of Lawrence burning a woman with a cigarette, possibly raping a teenage girl and brandishing a shotgun when his unusual sexual demands were refused. Although Lawrence denied the allegations, their very nature was sufficient to produce substantial prejudice

in the minds of the jury even when the allegations remained unproved. Admission of the evidence constituted an abuse of discretion because the testimony – based entirely upon allegations that were never prosecuted and about which the alleged victims did not testify – had no probative value, and its prejudicial effect was substantial.

II. The trial court erred in admitting Dr. Gravers' opinion testimony because it was based upon police reports concerning unadjudicated acts of sexual misconduct which are unreliable as a matter of law.

In *Garrett v. Commonwealth*, 276 Va. 590, 667 S.E.2d 739 (2008), this Court held that a psychologist's opinion[7] was inadmissible because it was based upon the existence of unadjudicated criminal charges, the underlying facts of which were never made the subject of sworn testimony before the trier of fact. *Garrett v. Commonwealth*, 276 Va. 590, 607, 667 S.E.2d 739, 749 (2008). The Court explained that "to be admissible an expert opinion must be based on an adequate factual foundation. An expert must not be permitted to express an opinion that is speculative and unreliable as a matter of law." *Id.* at 606, 667 S.E.2d at 748 (citation omitted). "Here, even with the

[7] Coincidentally, Dr. Gravers also was the psychologist whose testimony was at issue in *Garrett*.

additional records obtained by the Commonwealth shortly before trial,[8] the record still supports only a finding that allegations of wrongdoing were made, but that no prosecution resulted. Unlike in *Ellison [v. Commonwealth*, 273 Va. 254, 639 S.E.2d 209 (2007)], the allegations were never made the subject of sworn testimony before a trier of fact." *Garrett v. Commonwealth*, 276 Va. 607, 667 S.E.2d at 749.

Dr. Gravers' opinion testimony is based, at least in part, upon the same foundation that this Court held in *Garrett* to be speculative and unreliable as a matter of law. JA at 168. Dr. Gravers relied heavily on the police reports of the unadjudicated allegations in formulating her opinion that Lawrence presented a high risk of re-offending. Dr. Gravers explained that intimacy deficits[9] is one of the dynamic (changeable) risk factors that is useful in predicting risk of re-offense. JA at 77. In determining that Lawrence had intimacy deficits, Dr. Gravers relied "mainly" upon the police reports regarding the unadjudicated allegations of sexual misconduct, JA at 77-78, 118-19, 174, and that these reports "affected" her opinion. JA at 178. Furthermore,

---

[8] These other documents regarding the allegations included a police report. *Id.* at 596, 667 S.E.2d at 743.

[9] According to Dr. Gravers, "intimacy deficits" is a term that means "a person has problems with their intimate relationships." JA at 77.

Lawrence's denials of these unadjudicated allegations were viewed by Dr. Gravers as an indication of his "minimizing" and part of his pattern of "distorted thinking." JA at 175.

Dr. Gravers also relied upon the reports of unadjudicated sexual misconduct to diagnose Lawrence as having Paraphilia NOS and a personality disorder. Immediately after recounting the details of the unadjudicated allegations against Lawrence, the Commonwealth asked Dr. Gravers for her "clinical impressions of Mr. Lawrence[.]" Dr. Gravers responded:

> Well, Mr. Lawrence is quite a (sic) antisocial individual. He has a history of sexually aggressive behavior that's both represented in the sex offenses that I just talked about, but also in his behavior towards women that he's been involved with. He is – he's somebody that (sic) tends to, like I said, have these intimacy deficits. But he's also – he's also sexually aggressive . . . Clinically speaking, he would have a clinical diagnosis based upon this raping style that we would call a paraphilia not otherwise specified. And specifically that would be related to rape or non-consenting sex.

JA at 137-38. Dr. Gravers admitted that her conclusion that Lawrence displayed a pattern of sexual aggression was based on police reports for the unadjudicated allegations of prostitution and pandering, and the shotgun charge. JA at 167. Dr. Gravers also admitted that her diagnosis that

Lawrence had a personality disorder was based in part upon a long pattern of antisocial behavior that was described in the police reports for the unadjudicated allegations. JA at 168.

Dr. Gravers made the same error in Lawrence's case that the Court found that she made in *Garrett* – she assumed the truth of the allegations in the charging documents and the related police reports. *See Garrett v. Commonwealth*, 276 Va. at 606, 667 S.E.2d at 748. And as in *Garrett* and unlike *Ellison*, the alleged victims of these unadjudicated acts never testified before the jury. *See Id.* at 607, 667 S.E.2d at 748. Thus, the foundation for Dr. Gravers' opinions was, as in *Garrett* , "speculative and unreliable as a matter of law." *See Id.* at 606, 667 S.E.2d at 748.

The error in admitting Dr. Gravers' opinion testimony is not harmless. Dr. Gravers admitted that the unreliable foundation influenced "the case formulation in understanding Mr. Lawrence[.]" JA at 165. Although Dr. Gravers testified that she could make her diagnoses about Lawrence based only on the offenses for which Lawrence was convicted, JA at 170, the unreliable facts are so pervasively intertwined in her analysis of Lawrence, it

is impossible to isolate the effect of those facts on her opinion.[10] Also, Dr. Gravers did not state that she *in fact would have* reached the same diagnoses had she not considered the unadjudicated allegations. Dr. Boggio, who also evaluated Lawrence, did not make the same diagnosis as Dr. Gravers.

The foundation on which Dr. Gravers' opinions rest is so compromised by speculative and unreliable facts – which affected Dr. Gravers' whole understanding of Mr. Lawrence – her opinion testimony should not have been admitted.

---

[10] *See Garrett v. Commonwealth*, 276 Va. at 605, 667 S.E.2d at 748, in which the Court rejected the Commonwealth's argument that the unreliable foundation "was only incidental to [Dr. Gravers'] overall opinion and diagnosis."

CONCLUSION

The trial court committed reversible error by allowing the Commonwealth's psychologist to testify to the details of unadjudicated allegations of sexual misconduct by Lawrence learned from police reports. The trial court also committed reversible error by admitting the psychologist's opinions that were based in part on those same police reports, because such reports standing alone do not provide an adequate foundation. These errors require that Lawrence's determination as a sexually violent predator be reversed and a new trial granted.

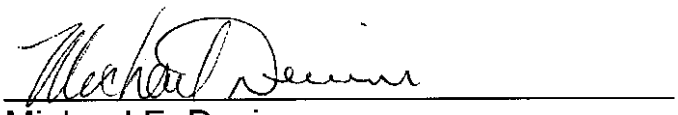
Respectfully submitted,

STEVEN LAWRENCE
By Counsel

Michael F. Devine (VSB 30490)
DEVINE, CONNELL & SHELDON, P.L.C.
10621 Jones Street, Ste 301A
Fairfax, Virginia 22030
(703) 691-8410
Fax (703) 251-0757
MFDESQ@DevineConnell.com

CERTIFICATE

I, Michael F. Devine, Counsel for Appellant, hereby certify that on this 9th day of October, 2009, in accordance with Rule 5:27(d), fifteen copies of this Opening Brief of the Appellant was delivered by hand to the Clerk of Court, and three copies mailed, first class, postage prepaid, to Counsel for the Appellee. In addition, an electronic copy of the Opening Brief and the Joint Appendix was filed on disc.



Michael F. Devine