VIRGINIA: IN THE CIRCUIT COURT OF ARLINGTON COUNTY
Civil Division

COMMONWEALTH OF VIRGINIA	)	
Petitioner,	)	
v.	)	**Case No. CL 17-3009**
GALEN MICHAEL BAUGHMAN	)	
Respondent.	)	

MOTION IN LIMINE TO EXCLUDE IRRELEVANT, PREJUDICIAL, CUMULATIVE, AND OTHERWISE INADMISSIBLE EVIDENCE

The Office of the Attorney General ("OAG") seeks to introduce an enormous quantity of testimony and evidence at 34-year-old Mr. Baughman's second sexually violent predator ("SVP") trial regarding events that occurred when Mr. Baughman was ages 14 to 19 years old —and all of which was available to OAG at the time of Mr. Baughman's first trial in 2012. OAG's planned trial presentation includes evidence regarding a 15-year-old conviction that does not qualify as sexually violent act under the Sexually Violent Predator Act ("SVPA" or "the Act"), as well as from another incident that occurred over 20 years ago, when Mr. Baughman was just 14 years old. This evidence is irrelevant, prejudicial, cumulative, and will confuse the jury. It should not be admitted.

OAG is only authorized to bring a second SVP petition when a person's mental health has changed since the first SVP trial, such that the individual now qualifies under the SVPA whereas he did not at the time of the previous trial. *See Rhoten v. Com.*, 286 Va. 262, 271-72, (2013). Under the doctrine of *res judicata*, it is not permissible for OAG to lose an SVP trial, file a subsequent petition, and then rely on evidence that was available to it at the first trial, in

hopes that the second jury will come to a different conclusion. Thus, all evidence that was available to OAG at Mr. Baughman's first trial should be excluded. In addition to being barred by the doctrine of *res judicata*, that evidence is simply not relevant to the jury's determination of whether Mr. Baughman's mental health has changed since 2012 such that he is *currently* a sexually violent predator under the Act.

In the alternative, any evidence regarding acts Mr. Baughman committed while a juvenile should be excluded as more prejudicial than probative. Both the passage of time and the nature of adolescent brain development renders the probative value of such evidence to Mr. Baughman's current mental status minimal, while the potential for this evidence to unduly prejudice the jury is great.

Additionally, any allegations of sexual misconduct that do not qualify as sexually violent acts should be excluded because they are more prejudicial than probative. Specifically, OAG has indicated its intent to introduce testimony and possibly images of child pornography related to a conviction from New York State, regarding communications Mr. Baughman engaged in when he was 19 years old. This conduct underlying this conviction does not qualify as sexually violent under the SVPA. It is also far too old to be probative as to Mr. Baughman's current mental state; would be cumulative and confusing for the jury; and has a high likelihood of unduly prejudicing the jury against Mr. Baughman.

FACTS AND PROCEDURAL BACKGROUND

1. On November 13, 2003, just after Mr. Baughman's twentieth birthday, he pled guilty to one count of carnal knowledge and one count of aggravated sexual battery. The aggravated sexual battery conviction arose from a 1997 incident in which Mr. Baughman, then 14 years old, touched the penis of a 9-year-old. The carnal knowledge conviction arose from

sexual contact between Mr. Baughman, then 19 years old, and a 15-year-old boy. While incarcerated, Mr. Baughman pled guilty to a 2003 offense for emailing pornography depicting teenagers to a police officer posing as a teenager.

2. On October 5, 2009, OAG filed a petition to commit Mr. Baughman as a sexually violent predator.

3. On October 9, 2009, OAG filed an amended petition to commit Mr. Baughman as a sexually violent predator. That petition alleged that Dr. Rex Miller "diagnosed the Respondent with Paraphilia NOS, with Pedophilia and Hebephilia Interests, Cognitive Disorder NOS by history, Narcissistic Personality Disorder." The petition further alleged that Dr. Miller opined that these diagnoses are "mental abnormalities or personality disorders." Finally, the petition alleged that "Dr. Miller determined that because of his mental abnormalities and/or personality disorder, the Respondent finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts" and thus Mr. Baughman met the criteria under of sexually violent predator.

4. The October 9, 2009 petition attached Dr. Miller's report. In that report, Dr. Miller opined that Mr. Baughman's narcissism and attraction to adolescents made it likely that he would manipulate others, particularly juveniles. Dr. Miller relied on Mr. Baughman's two Virginia convictions as well as conduct related to the 2003 conviction from New York. Dr. Miller excerpted portions of the records from New York in his report, including statements Mr. Baughman allegedly made to the detective in New York and statements of Mr. Baughman's allegedly made during online chats.

5. Mr. Baughman awaited trial in that case for **over two years**.

6. Mr. Baughman ultimately proceeded to trial on March 5-6, 2012. The Commonwealth's primary witness was Dr. Rex Miller.

7. Dr. Miller testified, consistent with his report, that Mr. Baughman suffered from narcissistic personality disorder and paraphilia. Dr. Miller testified that he relied on records from the New York prosecutor's office and chats to draw these conclusions. He testified that he reviewed reports "from the District Attorney of Westchester [sic] in New York." He further testified that he relied on "various, numerous pages, I would guess several hundred, related to online chats between Mr. Baughman and various individuals" to conclude that Mr. Baughman engaged in "grooming." *Id*. at 24, 27. He also relied on "the way he talked to individuals in instant messaging" to diagnose Mr. Baughman with narcissistic personality disorder. *Id*. at 42. He opined that someone with narcissistic personality disorder uses "interpersonal relationships to their advantage" and says "things about how important they are, they talk about how much power and control they have, and basically influence other people that do not feel particularly in power and control into believing those types of things and… [to] do what they want." 3/5/12 Tr. at 44-45. He testified that the narcissistic personality disorder was clinically significant to his conclusion that Mr. Baughman was a sexually violent predator because of "the way that he obtains his different victim pools, the persuasion and the things that were in the records related to what he would say to these impressionable individuals, that is the preying point. That is where he uses that personality disorder to obtain his victims." *Id*. at 45-46.

8. Dr. Miller further testified that Mr. Baughman suffered from paraphilia, not otherwise specified, with an attraction to adolescent males. 3/5/12 Tr. at 37-39. Dr. Miller opined that Mr. Baughman's narcissistic personality disorder and sexual interest in younger men resulted in Mr. Baughman being "a very intelligent manipulative person that is--that has deviant

sexual interest and will use that to gain those victims" which made him meet the definition of a sexually violent predator. *Id*. at 65.

9. OAG also elicited testimony at trial from Dr. Lisa Magazine, a psychologist who evaluated Mr. Baughman while he was in the Department of Corrections, about Mr. Baughman's statements regarding his "online interactions." *Id*. at 100.

10. The jury found Mr. Baughman *not to be a sexually violent predator* on March 6, 2012. Mr. Baughman was subsequently released from jail and onto probation in 2012.

11. From 2012 to 2016, Mr. Baughman had no violations of his probation. On April 8, 2016, Arlington Probation and Parole filed a "Major Violation Report" alleging that he had violated the condition prohibiting him from having contact with anyone under the age of 18. Specifically, the report alleged that Mr. Baughman had non-sexual text messages with the 16-year-old friend of his former neighbor who had died suddenly and whose out-of-state funeral Mr. Baughman attended with permission of his probation officer.

12. On November 29, 2016, Mr. Baughman's probation was revoked.

13. On November 6, 2017, OAG filed a second petition to commit Mr. Baughman as a sexually violent predator. The petition alleged that Dr. Michelle Sjolinder, Psy.D., "performed a mental health examination of the Respondent" and diagnosed Mr. Baughman with "Narcissistic Personality Disorder and Other Specific Paraphilic Disorder, Adolescent males."

14. The petition did not allege how Mr. Baughman's mental health had changed since a jury found that he was not a sexually violent predator in 2012.

15. Dr. Sjolinder's report similarly extensively cited online chats and statements Mr. Baughman had made to detectives in New York and relied heavily on information available at Mr. Baughman's 2012 trial.

16. On January 17, 2018, this Court held a probable cause hearing at which Dr. Sjolinder testified.

17. Dr. Sjolinder testified that she was *not* the expert designated to evaluate Mr. Baughman by the Commissioner of the Department of Behavioral Health and Developmental Services ("DBHDS") as mandated by the SVPA. Rather, when the DBHDS-designated expert found that Mr. Baughman was *not* a sexually violent predator, OAG asked Dr. Sjolinder to conduct a "record review" and give an opinion as to whether Mr. Baughman met the definition of a sexually violent predator under the Act. 1/17/18 Tr. at 34-36.

18. Dr. Sjolinder testified that when she conducted her "file review" she was also aware that a jury had previously found Mr. Baughman *not* to be a sexually violent predator. *Id.* at 38. Dr. Sjolinder testified that she was thus aware that both a jury and the most recent psychologist to conduct a mental health examination found that Mr. Baughman was *not* a sexually violent predator under the Act. *Id.* at 38.

19. Dr. Sjolinder testified she diagnosed Mr. Baughman with a paraphilic disorder with attraction to adolescents. She explained that she "came to the same conclusion" as Dr. Miller on this diagnosis and "agreed with the basis that he used as articulated in his report to come to that diagnosis." 1/17/18 Tr. at 82.

20. Dr. Sjolinder testified that she also diagnosed Mr. Baughman with narcissistic personality disorder, just as Dr. Miller had. *Id.* at 91.

21. After the probable cause hearing, OAG provided undersigned counsel with hundreds of pages related to incidents that allegedly occurred over 15 years ago, including a 2003 conviction from New York and a conviction based on conduct from when Mr. Baughman was 14 years old. OAG has subpoenaed the detective from the 2003 conviction—which was for a

non-sexually violent offense—to trial. OAG has also informed counsel that it intends to make pornography depicting teenagers available for undersigned counsel to review as part of discovery in this case.

ARGUMENT

I. All Evidence Available to OAG at Mr. Baughman's First Trial Should Be Excluded Because It Is Irrelevant to the Jury's Assessment of Mr. Baughman's Current Mental Status.

This Court should exclude any evidence and testimony that could have been presented at Mr. Baughman's first trial because it is not relevant to the jury's determination of Mr. Baughman's *current* mental health status. OAG's discovery disclosures strongly suggest that OAG hopes to re-try the 2012 trial now by presenting voluminous evidence from events that allegedly occurred between 1997 and 2003. Testimony and evidence related to Mr. Baughman's actions as a teenager is irrelevant to his current mental status.

The jury must decide whether Mr. Baughman's "*current* mental health status" is such that Mr. Baughman "'*finds* it difficult to control [his predatory behavior,] which *makes* him likely to engage [in sexually violent acts],'" whereas he did not meet the definition of a sexually violent predator in 2012. *Rhoten.*, 286 Va. at 271 (quoting Va. Code Ann. § 37.2-900) (emphasis in original).[1]

[1] *Rhoten* goes on to cite Va. Code Ann. § 37.2-904(B) for the proposition that the issue in an action brought by the Commonwealth to commit a person as a sexually violent predator is the person's current mental status, which is to be assessed by a licensed psychiatrist or licensed clinical psychologist appointed by the Commitment Review Committee ("CRC"), pursuant to § 37.2-904(B). The Commonwealth bases its petition in this case on the opinion an expert hired by and paid for by the Attorney General's Office; the psychologist who was appointed by the CRC in 2017, Dr. Ilona Gravers, found that Mr. Baughman *does not* meet the definition of "sexually violent predator" under to § 37.2-900.

The Virginia Supreme Court decided in *Rhoten* that the Commonwealth is not categorically barred from bringing a second SVP petition after a judge or jury found someone *not* to be an SVP at the first trial. *Id*. The respondent in *Rhoten* stipulated "that the Commonwealth's evidence [offered for the second petition] would be sufficient to prove, by clear and convincing evidence, that he is a sexually violent predator, as defined in the Act," *id*. at 266 (internal brackets omitted), leaving the sole issue for the Court of whether the Commonwealth is barred altogether from filing a second petition when a respondent was found not to be a sexually violent predator at the first trial. The Court found that OAG is not barred from filing a second petition because the Act "assumes the mental health of a sexually violent predator may change over time." *Id*. at 271.

In a transparent effort to re-try the case it lost in 2012, OAG intends to present evidence dating back to 1997 that is flatly irrelevant to Mr. Baughman's *current* mental status. OAG has subpoenaed a detective from New York who investigated Mr. Baughman's 2003 case—from when Mr. Baughman was 19 years old—and turned over hundreds of pages of discovery in connection with this incident. That conviction would not qualify as a sexually violent offense under Virginia law and was not listed in the petition as an underlying offense.

OAG has also indicated its intent to make available teen pornography photographs in discovery in connection with this 2003 New York incident. Mr. Baughman, who was a teenager himself at the time, pled guilty to sending teenager pornography to who Mr. Baughman thought was a 14-year-old (in reality, a police officer had taken over the 14-year-old's account). The images depict teenagers who were the same age as the 14-year-old to whom Mr. Baughman sent the photographs.

OAG has also provided numerous documents containing chats between teenaged 19-year-old Mr. Baughman and other teenagers. These chats occurred in 2003. None of these chats ever resulted in any adjudications. Many of these and the New York case-related chats reference Mr. Baughman's accounts of his own sexual experiences when Mr. Baughman was a younger teenager.

OAG has additionally provided discovery related to Mr. Baughman's two Virginia convictions, one of which was from an incident in 1997 when Mr. Baughman was 14 and one from an incident in 2003 when Mr. Baughman was 19. Seemingly, OAG intends to introduce details of the acts underlying these convictions, one of which was over 20 years ago when Mr. Baughman, who is now 34, was a young teen himself.

This evidence was all relied on by Dr. Rex Miller at Mr. Baughman's initial trial and OAG presented evidence related to those long-ago incidents to that jury. If this case is allowed to proceed to trial, that trial cannot be a re-do of the first where OAG presents a pile of evidence that was available to it in 2012, under the guise that Mr. Baughman's mental health has changed sufficiently to permit a second petition. OAG seeks to bombard the jury with witnesses and documents, including from the last century, in hopes that it can convince a second jury of what it could not convince a first. It hopes that if the pile looks large enough and the trial lasts long enough, the jury will feel as if it has to find Mr. Baughman a sexually violent predator. But none of this evidence from long ago is actually relevant to the question of whether Mr. Baughman is *currently* a sexually violent predator.

Any evidence that goes to Mr. Baughman's status as an SVP that existed at the time of his first trial should therefore be excluded here because it is not relevant to the jury's

determination of whether Mr. Baughman's mental health has changed such that he is now an SVP.

Additionally, should this Court find that any of this evidence is relevant, it should nevertheless be excluded under Va. Sup. Ct. R. 2:403(a), which provides, "[r]elevant evidence may be excluded if: (a) the probative value of the evidence is substantially outweighed by (i) the danger of unfair prejudice, or (ii) its likelihood of confusing or misleading the trier of fact[.]" Whatever probative value evidence from prior to 2012 might have, it is far outweighed by both the danger of unfair prejudice and the likelihood of confusing or misleading the jury.

"Unfair prejudice" in the context of Rule 403(a) is the "the tendency of some proof to inflame the passions of the trier of fact, or to invite decision based upon a factor unrelated to the elements of the claims and defenses in the pending case." *Lee v. Spoden*, 290 Va. 235, 251 (2015). That is exactly what OAG is attempting to do here—inflame the jury so that it makes a decision based not on Mr. Baughman's current mental health, but on communications and acts from when Mr. Baughman was a teenager. This evidence is further confusing and misleading and will distract the jury from the question at hand. Therefore, all evidence and testimony, including testimony by Dr. Sjolinder that relies on evidence that was available at the time of Mr. Baughman's first trial, should be excluded.

II. At a Bare Minimum, All Evidence Related to Mr. Baughman's Conduct as a Juvenile Should be Excluded.

All evidence and testimony related to incidents that occurred when Mr. Baughman was a juvenile should be excluded on the additional or alternative ground that the evidence is not probative. OAG has provided documents related to Mr. Baughman's arrest and conviction for aggravated sexual battery, an incident that took place 20 years ago, when Mr. Baughman was only 14 years old.

The conviction for aggravated sexual battery has no evidentiary value here because so much time has passed and because Mr. Baughman committed this offense when he himself was a juvenile. Courts have recognized that conduct engaged in as a juvenile has little bearing on adult behavior because adolescents' brains are not fully developed. *See United States v. Stern*, 590 F. Supp. 2d 945, 952-53 (N.D. Ohio 2008) (imposing a drastically reduced sentence for possession of child pornography where the defendant was 14 at the time he started viewing child pornography, noting, "the Court has conducted a review of the scientific literature in this area and believes there is compelling evidence that the judicial system's long standing principle of treating juvenile offenders differently than adult offenders is based in part on the unformed nature of the adolescent brain."). As the Supreme Court recognized in *Graham v. Florida*, 560 U.S. 48 (2010), when it struck down life without parole sentences for juvenile offenders convicted of non-homicide offenses, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Id.* at 68–69.

Evidence of Mr. Baughman's behavior when he was a child himself would thus have minimal evidentiary value here. The probative value is even less given that Dr. Sjolinder has diagnosed Mr. Baughman with paraphilia, not otherwise specified, with an attraction to adolescent males, and the petition is based on that diagnosis. Mr. Baughman's sexual act with a 9-year-old when Mr. Baughman was himself an adolescent is irrelevant to this diagnosis and irrelevant to Dr. Sjolinder's opinions about Mr. Baughman's risk. The prejudice is thus undue because Mr. Baughman's actions at age 14 with a 9-year-old would invite the jury to make a decision based on a factor unrelated to the diagnosis in the petition and unrelated to Mr. Baughman's current mental status.

III. Evidence Related to the New York Conviction Should Be Excluded Because It is More Prejudicial Than Probative, Cumulative, and Would Confuse the Jury.

Additionally, evidence related to the 2003 New York conviction should be excluded because the conviction is not related to a sexually violent act. Specifically, OAG has indicated its intent to introduce testimony and possibly pornographic images related to a conviction from New York State. This conviction does not qualify as a sexually violent act under the SVPA. This evidence is also from far too long ago to be probative of Mr. Baughman's current mental state. Mr. Baughman is now 34 years old. The probative value of a non-sexually violent offense conviction from when Mr. Baughman was 19 years old is nil. But the likelihood for prejudice, especially by exposing the jury to the pornographic images, is exceptionally high. This evidence, which was of course available to OAG prior to Mr. Baughman's 2012 trial, should be excluded.

CONCLUSION

For these and any other reasons that may occur to this honorable Court, Mr. Baughman respectfully requests that all evidence and testimony that could have been introduced at Mr. Baughman's 2012 trial be excluded. In the alternative, Mr. Baughman requests that evidence and testimony related to acts committed when Mr. Baughman was a juvenile and related to his 2003 conviction, which did not involve a sexually violent act, be excluded.

Dated: April 24, 2018. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via electronic mail and U.S. mail on the 24th of April, 2018 to:

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