VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of September, 2022.

Present: Goodwyn, C.J., Powell, Kelsey, McCullough and Chafin, JJ., and Millette and Mims, S.JJ.

Galen Michael Baughman, Appellant,

against Record No. 201348
Circuit Court No. CL17-3009

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Arlington County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the trial court.

In 2003, Galen Michael Baughman ("Baughman") pled guilty to aggravated sexual battery and carnal knowledge in connection with separate acts of sexual conduct with minors in 1997 and 2003. Baughman was sentenced to 30 years' imprisonment with 16 years suspended. In November 2009, when Baughman was scheduled for release, the Commonwealth petitioned to have him civilly committed as a sexually violent predator pursuant to the Sexually Violent Predators Act ("SVPA"), Code § 37.2-900, *et seq*. After a jury trial, Baughman was determined to not be a sexually violent predator and he was released on supervised probation.

On April 8, 2016, a report was filed asserting that Baughman had violated his probation by having unapproved and unsupervised contact with a person under 18 years old. Specifically, Baughman had exchanged several non-sexual text messages with a 16-year-old. Baughman's probation was subsequently revoked and he was sentenced to one year in jail.

In 2017, Baughman was visited by Dr. Ilona Gravers ("Dr. Gravers"), a licensed clinical psychologist designated by the Commissioner of Behavioral Health and Developmental Services (the "Commissioner") to evaluate if Baughman was a sexually violent predator. Baughman refused to be interviewed as part of Dr. Gravers' evaluation. Relying on the relevant records, including Baughman's former charges, the evidence presented against him at his criminal trial

and the text messages which led to his probation revocation, Dr. Gravers diagnosed Baughman with Narcissistic Personality Disorder but opined that this diagnosis "does not create a likelihood of having him commit sexually violent acts." Dr. Gravers further determined Baughman did not have a paraphilia diagnosis or other sexual disorder.

After receiving Dr. Gravers' report, the Commonwealth retained its own psychologist, Dr. Michelle Sjolinder ("Dr. Sjolinder"), for a "file review" of Baughman's records. Unlike Dr. Gravers, Dr. Sjolinder was not designated by the Commissioner pursuant to the SVPA, nor did she attempt to interview Baughman. After conducting her review, Dr. Sjolinder opined that Baughman suffered from both Narcissistic Personality Disorder and Other Specified Paraphilic Disorder; adolescent males. According to Dr. Sjolinder, Baughman's specific paraphilia could likely lead him to reoffend. Her report noted that, although there was no evidence Baughman had reoffended or engaged in explicitly sexual conversations with minors, there was a strong likelihood that he would reoffend in the future based on certain "grooming" behaviors that he had exhibited.

The Commonwealth subsequently initiated proceedings to have Baughman civilly committed as a sexually violent predator. On January 17, 2018, the trial court held a probable cause hearing pursuant to Code § 37.2-906. During the hearing, the Commonwealth offered copies of Baughman's convictions and probation violations into evidence. Additionally, the Commonwealth called Dr. Sjolinder to testify. Through her testimony, a copy of Dr. Sjolinder's report on Baughman was offered into evidence.

On cross-examination, Dr. Sjolinder admitted she had neither been appointed by the Commitment Review Committee (the "CRC") nor designated by the Commissioner to conduct a mental health evaluation of Baughman. According to Dr. Sjolinder, she had been hired to do a "file review based evaluation based upon someone they desired a second opinion on." Baughman moved to dismiss the case or, in the alternative, for a continuation of the hearing to present the testimony of Dr. Gravers. The trial court denied both motions. It found that there was probable cause to believe that Baughman was a sexually violent predator. In reaching this conclusion, the trial court specifically referenced Baughman's previous convictions, Dr. Sjolinder's testimony and her report.

Baughman subsequently moved to have the trial court reverse its finding of probable cause. In his motion, Baughman asserted that Dr. Sjolinder should not have been permitted to

testify at the probable cause hearing. Baughman noted that Dr. Gravers was the properly designated professional under the SVPA and she had opined that he was not a sexually violent predator. He claimed that, under Code § 37.2-906(E), Dr. Sjolinder was not qualified to provide testimony at the probable cause hearing because she was not designated by the Commissioner. The trial court denied the motion, ruling that the Attorney General is vested with the authority to determine the relevant evidence to be presented at a probable cause hearing. The trial court further explained that Dr. Sjolinder was qualified to testify as an expert witness because she is a "licensed psychiatrist or licensed clinical psychologist skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the Commitment Review Committee." Notably, the trial court did not address the fact that Dr. Sjolinder was not designated by the Commissioner.

At trial, the Commonwealth called several witnesses, including Dr. Sjolinder. Over Baughman's objection, Dr. Sjolinder testified that Baughman met the definition for a sexually violent predator and was likely to commit subsequent acts that were sexually violent in nature, although she could not say which specific offenses Baughman was likely to commit. In addition to Dr. Sjolinder's testimony, the jury heard about Baughman's conduct that resulted in his 2003 conviction.

At the close of the Commonwealth's case, Baughman moved to strike and for summary judgment in his favor on the grounds that the court erred in permitting Dr. Sjolinder to testify, the Commonwealth had not demonstrated Baughman was likely to engage in sexually violent acts, and the Commonwealth had not presented sufficient evidence of a material change in Baughman's mental health since 2012. The trial court denied the motion, explaining that the SVPA does not require that the Commonwealth use an expert designated by the Commissioner throughout the trial proceedings and that Baughman's interpretation of the SVPA would divest the court of its role as the gatekeeper for all expert qualifications, which "cannot be" the intent of the General Assembly.

Baughman subsequently called several character witnesses to rebut Dr. Sjolinder's characterization of him. After considering the evidence, the jury found that Baughman was a sexually violent predator.

On appeal, Baughman argues that the trial court erred in permitting Dr. Sjolinder to testify as an expert witness because she was not appointed by the Commissioner. Specifically,

Baughman contends that, under the SVPA, only the psychologist designated by the Commissioner can testify as an expert for the Commonwealth. As Dr. Sjolinder was not designated by the Commissioner, Baughman insists that she was not permitted to testify at either the probable cause hearing or the subsequent trial.

Addressing Dr. Sjolinder's testimony at the probable cause hearing, the Court notes Code § 37.2-906 controls the manner in which such hearings are conducted under the SVPA. Code § 37.2-906(E) states that an expert witness may be permitted to testify at the probable cause hearing "[i]f he meets the qualifications set forth in subsection B of § 37.2-904." Code § 37.2-904(B), in turn, provides that the individual conducting a mental health examination must be "a licensed psychiatrist or a licensed clinical psychologist who is *designated by the Commissioner*, skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the CRC."[1] (Emphasis added.) It is important to note that Code § 37.2-906(E) explicitly conditions expert witness testimony on meeting these qualifications with no exceptions.[2] Thus, the plain language of the statute indicates that the only experts[3] who may testify at a probable cause hearing under the SVPA are those who meet the

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[1] This Court has recognized that the qualifications of an individual administering a test are generally "a matter of substance, not procedure." *Brooks v. City of Newport News*, 224 Va. 311, 315 (1982). Here, Code § 37.2-904(B) is referenced as the source of the qualifications to allow an expert witness to testify under Code § 37.2-906(E). In other words, although the qualifications are derived from Code § 37.2-904(B), they are applied under Code § 37.2-906(E). To hold that the substantial compliance language of Code § 37.2-905.1 is incorporated into Code § 37.2-906(E) by the mere reference to the qualifications in Code § 37.2-904(B) would require that the Court disregard the substantive nature of the qualifications. Further, it would extend the application of Code § 37.2-905.1 beyond its plain language to include Code § 37.2-906, in violation of the time-honored maxim *expressio unius est exclusio alterius*. *See Turner v. Sheldon D. Wexler, D.P.M., P.C.*, 244 Va. 124, 127 (1992) ("This maxim provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute."). Accordingly, the substantial compliance language of Code § 37.2-905.1 is necessarily inapplicable in this context.

[2] *Compare* Code § 37.2-906(E) (permitting the testimony of "the expert witness" who "meets the qualifications set forth in subsection B of § 37.2-904") *with* Code § 37.2-908(C) (permitting the testimony of "any expert witness" who "meets the qualifications set forth in subsection B of Code § 37.2-904 *or* 37.2-907") (emphasis added).

[3] Code § 37.2-904(F) indicates that additional qualified experts may be appointed by the Commissioner "[i]f the CRC deems it necessary." Thus, it is possible that more than one expert

express qualifications stated in Code § 37.2-904(B). *See Commonwealth v. Allen*, 269 Va. 262, 273 (2005) ("Where a statute designates express qualifications for an expert witness, the witness *must* satisfy the statutory criteria in order to testify as an expert.") (emphasis added).

Here, it is an undisputed fact that Dr. Sjolinder was not designated by the Commissioner nor did she take any part in Baughman's mental health examination. She was, instead, retained by the Commonwealth after it received Dr. Gravers' report. Although the Commonwealth is clearly permitted to consult with Dr. Sjolinder, nothing in Code § 37.2-906 permits the Commonwealth to call her as an expert witness at the probable cause hearing. Similarly, any discretion that the trial court had to allow her expert testimony during the probable cause hearing was limited by the plain language of Code § 37.2-906(E), which explicitly conditioned such testimony on whether Dr. Sjolinder met the qualifications set forth in Code § 37.2-904(B).

The Commonwealth, however, takes the position that "designated by the Commissioner" is not a qualification for the purposes of Code § 37.2-906(E). Rather, it insists that "designated by the Commissioner" is merely a descriptor of how a licensed psychiatrist or licensed psychologist is selected to conduct the CRC assessment. In other words, the Commonwealth asserts that "designated by the Commissioner" is only relevant for determining who can conduct a mental health examination under Code § 37.2-904(B), not for who may be permitted to testify as an expert under Code § 37.2-906(E).

The Commonwealth's argument is undermined by the manner in which the General Assembly wrote Code § 37.2-904(B). The phrase "who is," as used in Code § 37.2-904(B), indicates that the subsequent adjective phrases, including "designated by the Commissioner" are all part of the same relative clause. Notably, nothing in the language of either Code § 37.2-904(B) or Code § 37.2-906(E) indicates that the General Assembly intended for some of these adjective phrases to be interpreted in a different manner from the others. Thus, the entirety of the relative clause must be interpreted in the same manner. In other words, all of the adjective phrases are either descriptors or qualifications. As there can be no doubt that the adjective phrases "skilled in the diagnosis and risk assessment of sex offenders" and "knowledgeable about the treatment of sex offenders" are meant to be qualifications, the entire relative clause

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witness may meet the qualifications set forth in Code § 37.2-904(B) and, therefore, be permitted to testify at the probable cause hearing.

must be interpreted in a similar manner. Therefore, contrary to the Commonwealth's argument, the adjective phrase "designated by the Commissioner" is a qualification, not a descriptor. Accordingly, because Dr. Sjolinder did not meet the qualifications set forth under Code § 37.2-904(B), under the plain language of Code § 37.2-906(E), she was not permitted to testify as an expert at the probable cause hearing.

The next question before the Court is whether, in the absence of Dr. Sjolinder's testimony, the evidence was sufficient to establish that probable cause existed to believe that Baughman was a sexually violent predator. Under the SVPA, to establish that an individual is a sexually violent predator, the Commonwealth is required to show that the individual "had been convicted of a sexually violent offense and that, because of a mental abnormality or personality disorder, he finds it difficult to control his predatory behavior which makes him likely to engage in sexually violent acts." *Commonwealth v. Squire*, 278 Va. 746, 749 (2009).

Here, the record establishes that Dr. Sjolinder's report was entered into evidence through her testimony. Thus, without her testimony, the trial court had no basis for considering her report.[4] Therefore, the only evidence that was properly before the trial court were the documents establishing Baughman's prior convictions and probation violations. As the trial court had no evidence regarding Baughman's mental state, it could not have found that there was probable cause to believe that he was a sexually violent predator. Accordingly, the trial court should have dismissed the Commonwealth's petition pursuant to Code § 37.2-906(F).[5]

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[4] Contrary to the Commonwealth's assertion in its letter brief, Baughman did not agree to admit Dr. Sjolinder's report into evidence. Rather, the record establishes that, after the probable cause hearing, a question arose regarding whether Baughman's local counsel was an active member of the Virginia State Bar. This, in turn, led to questions regarding the validity of the initial probable cause hearing, thereby prompting the trial court to schedule a new probable cause hearing. The parties subsequently stipulated that *if* it was necessary to hold another probable cause hearing, the Commonwealth would present the same evidence (i.e., evidence of Baughman's prior convictions and probation violations, a copy of Dr. Sjolinder's report, and Dr. Sjolinder's testimony). Additionally, the parties agreed "that they would present the same arguments for and against probable cause." Taken as a whole, it is apparent that Baughman was not agreeing that Dr. Sjolinder's report was admissible; rather, he was simply agreeing that the subsequent probable cause hearing would be the same as the first.

[5] As the determination that no probable cause existed to believe that Baughman was a sexually violent predator is dispositive of this appeal, the Court does not reach the question of whether Dr. Sjolinder should have been permitted to testify at trial under Code § 37.2-908(C).

In its letter brief, the Commonwealth relies on *United States v. Mechanik*, 475 U.S. 66, 70 (1986), for the notion that any error in admitting Dr. Sjolinder's testimony during the probable cause hearing is harmless error, due to the jury's subsequent determination that Baughman is a sexually violent predator. *Mechanik*, however, involved two witnesses testifying "in tandem" before a grand jury in violation of the Federal Rules of Criminal Procedure. *Id.* at 68. The violation was not discovered until after trial had commenced. *Id.* The Supreme Court ruled that, in that situation, the jury's verdict rendered the pre-trial violation harmless. *Id.* at 73.

In her concurring opinion, Justice O'Connor took issue with the fact that the Supreme Court focused only on the subsequent verdict, not on the nature of the pre-trial violation. *Id.* Justice O'Connor asserted that, because the error occurred during the grand jury proceeding and was not a trial error, the focus of the harmless error analysis must be on the effect it had on the charging decision. According to Justice O'Connor, the majority's approach, especially where an objection to the charging procedure is timely raised, "gives judges and prosecutors a powerful incentive to delay consideration of motions to dismiss based on an alleged defect in the indictment until the jury has spoken. If the jury convicts, the motion is denied; if the jury acquits, the matter is mooted." *Id.* at 77. She insisted that the better alternative is to focus on whether the pre-trial violation prejudiced the defendant and had a "substantial influence" on the outcome of the proceeding. *Id.* at 78 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). In other words, Justice O'Connor took the position that a conviction by a petit jury should only render lesser errors in the charging decision harmless, whereas more significant errors could justify quashing the indictment.

Tellingly, a mere two years later, the Supreme Court adopted Justice O'Connor's approach as the standard to be applied when a court is asked to dismiss an indictment *prior* to the conclusion of trial. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). Thus, the proper approach is to first apply the standard adopted in *Bank of Nova Scotia* and, if that standard is not met, then *Mechanik* controls.[6]

Additionally, the other matters that Baughman raised in his appeal (i.e., the trial court's decision to exclude the testimony of his expert witnesses, its denial of his motion for summary judgment and its failure to dismiss the petition based on res judicata) are similarly rendered moot.

[6] It is worth noting that, in *Bell v. Commonwealth*, 264 Va. 172, 191 (2002), the only case in which this Court has applied *Mechanik*, it is clear that the *Bank of Nova Scotia* standard would

In the present case, Baughman clearly raised the issues related to Dr. Sjolinder's expert testimony before trial. As Dr. Sjolinder's expert testimony provided the only means for the trial court to determine Baughman's mental state, the trial court's error was clearly prejudicial to Baughman and substantially influenced the trial court's determination of probable cause. Indeed, absent the trial court's error, the Commonwealth's petition would have been dismissed and the matter never would have reached the jury. Accordingly, the standard adopted in *Bank of Nova Scotia* has been met and, therefore, the Court is not concerned with the jury's subsequent determination.

For the foregoing reasons, the trial court's decision finding probable cause to believe that Baughman was a sexually violent predator is reversed and vacated, and pursuant to Code § 37.2-906(F), the Commonwealth's petition seeking to have Baughman declared a sexually violent predator is dismissed.

Reversed and dismissed.

JUSTICE KELSEY, with whom JUSTICES McCULLOUGH and CHAFIN join, dissenting.

The Attorney General of Virginia filed a petition against Galen Michael Baughman asserting that he is a "[s]exually violent predator" under the Sexually Violent Predators Act ("SVPA"), Code §§ 37.2-900 to -921. A jury unanimously agreed. The majority vacates the verdict on the ground that the expert appointed by the Attorney General was not "qualified" to provide testimony at the probable-cause hearing because she was hired by the Attorney General rather than by the Commissioner of the Department of Behavioral Health and Developmental Services. Finding this argument unconvincing, I respectfully dissent.

I.

The SVPA applies the "[s]exually violent predator" classification to any person who "has been convicted of a sexually violent offense" and who, "because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely

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not have been met. In contrast, in *Pease v. Commonwealth*, 24 Va. App. 397, 400 (1997), the Court of Appeals applied the *Bank of Nova Scotia* standard and reversed the defendant's conviction. Indeed, the Court of Appeals specifically distinguished *Mechanik*, noting that the error at issue in *Pease* "was significant enough to justify quashing the indictment." *Id.* at 400 fn.1.

to engage in sexually violent acts." Code § 37.2-900. Circuit courts can order individuals in this category to submit against their will to outpatient or inpatient treatment for the psychiatric reasons underlying their predatory behavior. The purpose of the treatment is to rehabilitate the predator and to protect others from being victimized, not to punish the predator for abusing prior victims.

In 2004, Baughman was convicted after entering guilty pleas to charges of carnal knowledge of a minor and aggravated sexual battery of a minor. After Baughman was released from incarceration in 2012, Baughman violated his terms of probation, and as a result, the trial court partially revoked his suspended sentence. Just prior to Baughman's anticipated release from this second incarceration period, the Attorney General filed an SVPA petition against Baughman.

At the probable-cause hearing on the SVPA petition, the Attorney General demonstrated a detailed account of Baughman's history of predatory behavior directed at young boys. In 2003, Baughman initiated a series of sexually explicit instant messages with a 14-year-old boy. The boy's mother discovered the messages and turned the matter over to New York police investigators. During subsequent messages with a police investigator posing as the boy, Baughman stated that he

- had recently engaged in sexual acts with a boy who "had just turned 12";
- "would have sex with pretty young boys";
- had participated in sexually explicit phone calls with 20 different boys, most around the age of 14, while they masturbated;
- believed that oral sex with boys "usually after age 10" was "considered acceptable"; and
- maintained a collection of child pornography but, fearing it would be discovered by law enforcement, "deleted all the illegal pictures of boys [he] had on [his] comput[er]."

3 J.A. at 996-97, 1000-01, 1003, 1005-06. During one of these conversations, Baughman emailed child pornography to the investigator posing as the boy with instructions to hide it on his

computer "someplace [his] parents wouldn't find" it. 8 *id.* at 1015.[1] Pursuant to a search warrant, the investigator later found several hundred images of child pornography on Baughman's computer, including images of children as young as four. *See* 3 *id.* at 1197-98; 8 *id.* at 188-89. Baughman labeled one of his folders "prey," which contained a contact list for instant messaging. 3 *id.* at 989, 1199.

After being contacted by New York police about possible victims in Virginia, Virginia law enforcement officers also investigated Baughman and discovered that he had preyed on three minor boys in Virginia. One victim was an eighth grader. After they had oral sex, the upset minor locked himself in a bathroom. Baughman later told the minor, "I never wanted to hurt you." *Id.* at 1022, 1295. Another minor had witnessed the sexual encounter and reported that Baughman had threatened to "kill him" if he told anyone what had happened. 8 *id.* at 190. The second victim was a 15-year-old boy that Baughman had picked up in his vehicle and had driven to a remote location for oral sex. Baughman targeted the third victim, a 13-year-old boy in middle school, through instant messages online. When Baughman began messaging the boy, the boy did not know Baughman's identity, only his screen name. Baughman asked the boy inappropriate questions about masturbation. After the boy told his older brother about the messages, the older brother and a friend posed as a 13-year-old named "Johnny" in instant messages with Baughman, in which Baughman explicitly solicited oral sex. *See id.* at 191; 3 *id.* at 1347. After the Virginia investigation became public, a fourth victim's mother came forward to describe an incident in 1997 when Baughman was 14 and her son was 9. After Baughman and the 9-year-old had been left alone in a room, Baughman asked the 9-year-old if he wanted to learn about masturbation, and when the boy agreed, Baughman masturbated the boy. The boy later reported the incident to his parents, and a pediatrician examined the boy and discovered an abrasion on his penis. These four incidents led to Baughman's prosecution in Virginia and his guilty pleas in 2004 to charges of carnal knowledge of a minor and aggravated sexual battery of a minor. Baughman was released from prison on supervised probation in 2012.

[1] The final volume of the eight joint appendices filed in this appeal has been sealed by order of this Court. To the extent that this opinion mentions facts found in the sealed record, only those specific facts have been unsealed because they are relevant to the decision in this case. The remainder of the previously sealed record remains sealed.

In April 2016, Baughman was arrested for violating the terms of his probation following unauthorized contact with minor boys. In August 2015, Baughman had received permission to attend the funeral of a family friend's teenage son in Minnesota with Baughman's mother being the approved supervisor. At the funeral, Baughman took an interest in several 16-year-old boys who were friends of the deceased. Following the funeral, Baughman offered and provided an unsupervised car ride to one of the boys to go home and change clothes. Baughman continued to reach out to the boys that he had met at the funeral via text messages after he had returned home.

A few months later, one mother contacted Baughman's probation officer and reported Baughman's communications with her son. Baughman's probation officer then directed Baughman to cease all communications with anyone under 18. After a second mother reported Baughman's communications with her son and his suspected communications with other boys that had attended the funeral, Baughman's probation officer required Baughman to turn over all his electronics for inspection. Investigators discovered the profiles of three minor boys on Baughman's phone, a laptop that had been purchased without approval, and evidence of continued communications with two 16-year-old boys after Baughman had been instructed to cease all communications with anyone under 18. While the text messages with the boys were not explicitly sexual in nature, some of the messages reflected a similar pattern of grooming that had led to Baughman's prior convictions. In text messages to one of the boys, Baughman gave him advice about how to hide his texts from his parents and the police, invited the boy to visit him, and told him, "Are you the best looking guy you know? I can't imagine there are classically beautiful young men in Minnesota." 8 *id.* at 196. As a result of the unauthorized contacts with minors, Baughman's suspended sentence was partially revoked, and he received a sentence of one year in addition to the eight months of time he had already served.

Just prior to Baughman's anticipated release from incarceration, Dr. Michelle Sjolinder — a licensed clinical psychologist and certified sex-offender-treatment provider retained by the Attorney General — completed a mental health evaluation of Baughman by reviewing his written records and testified on behalf of the Commonwealth at both a probable-cause hearing and trial concerning the SVPA petition. Dr. Sjolinder diagnosed Baughman with "Narcissistic Personality Disorder" and "Other Specified Paraphilic Disorder; adolescent males," *see id.* at 198, and she concluded that Baughman was in the "above-average risk" category for reoffending, placing him in the 90th percentile of sex offenders, *see* 1 *id.* at 45; 8 *id.* at 199-200.

Dr. Sjolinder thus opined that Baughman met the definition of a sexually violent predator as defined by Code § 37.2-900. The trial court found that probable cause existed, and following trial, a jury unanimously found by clear-and-convincing evidence that Baughman was a sexually violent predator.

II.

On appeal, Baughman makes several arguments, the principal one being that the trial court erred by permitting Dr. Sjolinder to testify as an expert witness at Baughman's probable-cause hearing and at trial.[2]

A.

Baughman first claims that, under Code §§ 37.2-906(E), -908(C), and -904(B), Dr. Sjolinder did not have the qualifications to testify as an expert witness at either the probable-cause hearing or the trial because she was not "designated" as an expert by the Commissioner of the Department of Behavioral Health and Developmental Services. The majority accepts this interpretation of the SVPA regarding an expert witness's testimony at the probable-cause hearing. I do not.

Under Virginia law, a witness in a civil case who is "qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Rule 2:702(a)(i); Code § 8.01-401.3(A); *see, e.g., Norfolk & W. Ry. v. Anderson*, 207 Va. 567, 571 (1966). *See generally* Kent Sinclair & Charles E. Friend, The Law of Evidence in Virginia § 13-7[b]-[c], at 803-05 (8th ed. 2018); Thomas J. Curcio & R. Lee Livingston, Virginia Evidence for the Trial Lawyer § 7-3, at 67-68 (2019). A "qualified" expert is one that has a baseline background to present a *quality* opinion — which cannot be done if the putative expert lacks the "knowledge, skill, experience, training, or education" to actually know what he

[2] Baughman also contends that the trial court erred by excluding two of his proffered experts. The court exercised its inherent authority to do so, however, because Baughman had repeatedly refused to cooperate in the statutorily required SVPA evaluation process. As we recently held: "As a matter of basic fairness, courts generally will not permit a litigant to engage in gamesmanship by refusing to cooperate with the other party's expert while tendering evidence from their own expert." *Ferrara v. Commonwealth*, 299 Va. 438, 450-51 (2021). Baughman also argues that the verdict should have been set aside because it was supported by insufficient evidence and, in any event, was barred by res judicata. I disagree. The totality of the evidence amply supports the jury verdict. *See DeMille v. Commonwealth*, 283 Va. 316, 318, 324-25 (2012). And res judicata does not apply to SVPA proceedings under these circumstances. *See Rhoten v. Commonwealth*, 286 Va. 262, 269-72 (2013).

is talking about. *See* Rule 2:702(a)(i); *see, e.g.*, *Combs v. Norfolk & W. Ry.*, 256 Va. 490, 496-97 (1998).

Code § 37.2-906(E) provides that a witness who "meets the qualifications set forth in subsection B of § 37.2-904" may testify as an expert at an SVPA probable-cause hearing. Likewise, Code § 37.2-908(C) provides that a witness who "meets the qualifications set forth in subsection B of § 37.2-904 or 37.2-907" may testify at an SVPA trial. Code § 37.2-904(B) provides that "assessments of eligible prisoners" by the Commitment Review Committee ("CRC"), under the supervision of the Department of Corrections, "shall include a mental health examination, including a personal interview, of the prisoner." That examination is conducted "by a licensed psychiatrist or a licensed clinical psychologist who is designated by the Commissioner, skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the CRC." Code § 37.2-904(B). Three distinct qualifications are thereby identified for an expert to provide a quality opinion. The expert must be

- "a licensed psychiatrist or a licensed clinical psychologist,"
- "skilled in the diagnosis and risk assessment of sex offenders," and
- "knowledgeable about the treatment of sex offenders."

Code § 37.2-904(B).

The specific "expert" being addressed in Code § 37.2-904(B) is not necessarily the expert who will testify at the probable-cause hearing that will later take place, if at all, in the circuit court. The expert in Code § 37.2-904(B) is a *pre-litigation expert* "designated" (that is, chosen or selected) by the Commissioner to help the CRC make a recommendation to the Attorney General, who will decide whether to file an SVPA petition in circuit court. To be sure, the Commissioner's expert does not testify at all or provide any sworn statements at this stage. The Commissioner's expert merely serves as a consulting expert who conducts a "mental health examination, including a personal interview, of the prisoner" and gives advice to the CRC on whether the prisoner is a sexually violent predator. *See id.*

Baughman misreads the Commissioner's *designation* of the CRC's pre-litigation consulting expert to be a *qualification* for any testifying expert presented by the Attorney General at the later probable-cause hearing or trial. *Cf. Wynn v. Commonwealth*, 277 Va. 92, 98 (2009) (omitting the phrase "designated by the Commissioner" with an ellipsis when quoting the

qualifications of an expert from Code § 37.2-904(B)). I know of no legal definition of expert "qualifications" that turns on who hired the expert. An expert does not become qualified by virtue of being hired or disqualified by virtue of not being hired.[3]

Baughman's view to the contrary misunderstands the SVPA process. *See Ferrara v. Commonwealth*, 299 Va. 438, 445-46 (2021) (describing this process). The General Assembly gave the Attorney General — not the CRC's pre-litigation consulting expert — the ultimate authority to decide whether to file a petition for civil commitment in a Virginia circuit court. The Attorney General of Virginia is the chief executive officer of the Department of Law for the Commonwealth. *See* Code § 2.2-500; 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 669-70 (1974). The Attorney General's independent judgment is what matters. *See* Code § 2.2-507 ("All legal service in civil matters for the Commonwealth . . . shall be rendered and performed by the Attorney General . . . ."). An opinion by a CRC pre-litigation consulting expert cannot take that decision away from the Attorney General.[4]

Consider too the effect of Baughman's argument on other prisoners. If he correctly reads Code § 37.2-904(B) as only qualifying experts that have been designated by the Commissioner, no prisoner could ever introduce favorable expert testimony at a probable-cause hearing. Code § 37.2-906, after all, governs probable-cause hearings, and its requirement that experts have the "qualifications" specified in Code § 37.2-904(B) applies to prisoners seeking to defeat a probable-cause determination every bit as much as to the Attorney General seeking to support one. But it would be absurd to say that a prisoner, if he fully cooperated with the process as the statutes require, could not call his own expert to defend himself against an SVPA petition. Yet Baughman's argument, literally yet illogically, would lead to that conclusion.

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[3] I acknowledge that a statute may require additional specialized requirements to qualify an expert witness to testify in a particular subject area, but these traditional qualification requirements typically include licensure, certification, specialized training, or experience that touch on a witness's ability to provide a quality opinion about a particular topic. *See generally* Sinclair & Friend, *supra*, § 13-7[e], at 809. How an expert is hired has nothing to do with an expert's ability to speak about a specific topic. I thus fail to see why we must interpret Code § 37.2-904(B) as containing "either descriptors or qualifications," but not both, as posited by the majority, *see ante* at 7.

[4] Baughman relies on *Harvey v. Commonwealth*, 297 Va. 403, 421-22 (2019), to suggest the opposite. Our opinion in *Harvey*, however, addressed SVPA revocation proceedings under Code § 37.2-913, not SVPA petitions filed by the Attorney General under Code § 37.2-905.

B.

1.

Even if the SVPA could be interpreted to deem a Commissioner's choice of an expert as an expert qualification, the Commonwealth substantially complied with the requirements of Code § 37.2-904(B). Code § 37.2-905.1 states that "[t]he provisions of §§ 37.2-903, 37.2-904, and 37.2-905 are procedural and not substantive or jurisdictional," and thus, "[a]bsent a showing of failure to follow these provisions as a result of gross negligence or willful misconduct, it shall be presumed that there has been substantial compliance with these provisions." Both Code §§ 37.2-906(E) and -908(C) incorporate by reference "the qualifications set forth in subsection B of § 37.2-904" to permit an expert witness to testify at either the probable-cause hearing or trial. These cross-references necessarily imply that unless Baughman demonstrates that the Commonwealth's failure to comply with the expert qualifications set forth in Code § 37.2-904(B) was the result of gross negligence or willful misconduct, we should presume that the Commonwealth substantially complied with its requirements.[5]

Baughman has made no such showing of gross negligence or willful misconduct on the part of the Commonwealth to rebut this presumption. *See Warrington v. Commonwealth*, 280 Va. 365, 372-73 (2010). Just the opposite. Baughman's counsel admitted to the trial court more than once at the end of the probable-cause hearing that Baughman was not arguing that an expert who was otherwise qualified could not testify as a matter of law at the probable-cause hearing if she had not been designated by the Commissioner.[6] *See* 1 J.A. at 155-58. Baughman's counsel reiterated that Baughman was only arguing that Dr. Sjolinder's testimony could not be the basis

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[5] The majority cites *Brooks v. City of Newport News*, 224 Va. 311, 315 (1982), for the proposition that the "qualifications of an individual administering a test are generally 'a matter of substance, not procedure.'" *Ante* at 5 note 1 (citation omitted). *Brooks* involves the predecessor statute to Code § 18.2-268.9, which requires the person administering DUI breath tests to be properly licensed to conduct such tests. This is an entirely different scenario. *See supra* at 16 note 3. *Brooks* nevertheless has some relevance, however, because in that case, we held that the erroneous admission of the certificate of analysis completed by someone not licensed to operate a breath test was harmless error, *see Brooks*, 224 Va. at 315-16, a conclusion similar to the alternative harmless-error conclusion that I also reach in the present case. *See infra* at 20-23.

[6] To the extent that Baughman subsequently argued that Dr. Sjolinder should not be permitted to testify at the probable-cause hearing at all because she had not been designated by the Commissioner, that argument is prohibited by the approbate-reprobate doctrine. *See, e.g.*, *Wooten v. Bank of Am., N.A.*, 290 Va. 306, 309-10 & n.1 (2015).

of an SVPA petition. *See id.* at 156-57.[7] As a matter of law, the Commonwealth did not commit gross negligence or willful misconduct in relying on Dr. Sjolinder's testimony at the probable-cause hearing.[8]

2.

Baughman also mistakenly views Code § 37.2-904(B) through the lens of lenity. The rule of lenity is inapplicable for two reasons. First, it has been supplanted by Code § 37.2-905.1, which operates in the exact opposite interpretative direction than the rule of lenity. And, second, even if the rule applied, it does not support Baughman's interpretation of Code § 37.2-904(B).

a.

The single citation relied upon by Baughman for the proposition that the rule of lenity applies to SVPA proceedings, *Townes v. Commonwealth*, 269 Va. 234 (2005), did not address substantial compliance or its effect on the rule of lenity in SVPA cases because *Townes* was decided before Code § 37.2-905.1 was enacted in 2007. A pair of decisions by this Court interpreting former Code § 37.2-903 just prior to and after the passage of the substantial-compliance statute illustrates its effect on the application of the rule of lenity. In *Shelton v. Commonwealth*, we applied the rule of lenity to dismiss an SVPA petition because the recidivism score required under former Code § 37.2-903(C) to bring a petition had been incorrectly calculated too high. 274 Va. 121, 129 (2007). In a footnote following this analysis, we noted without further commentary that the substantial-compliance statute had been recently enacted and would soon take effect. *See id.* at n.3. In a 2018 case involving another allegedly incorrect recidivism score, we held that *Shelton* was "no longer good law" because Code § 37.2-905.1 had

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[7] Code § 37.2-905.1 still applies to this alleged deficiency. Code § 37.2-904 governs the initial mental health examination and the CRC assessment and recommendation to the Attorney General, and Code § 37.2-905 governs the Attorney General's decision to file a petition for commitment. Both of these statutes are subject to the substantial-compliance provision in Code § 37.2-905.1.

[8] Despite the failure of either party to address Code § 37.2-905.1 in the proceedings below, we have the authority to affirm the trial court's judgment "on any legal ground appearing in the record" because the "prevailing party seeks to enforce not a trial court's reasoning, but the court's *judgment*." *Cherrie v. Virginia Health Servs., Inc.*, 292 Va. 309, 318-19 (2016) (emphasis in original) (citation omitted). "No cross-appeal is necessary when an appellee seeks to support a judgment on alternative legal grounds, including those expressly rejected by the trial court and those raised for the first time on appeal." *Alexandria Redev. & Hous. Auth. v. Walker*, 290 Va. 150, 156 (2015).

"altered the applicable standard" and now required a presumption of substantial compliance for SVPA provisions deemed to be procedural and not substantive or jurisdictional. *Commonwealth v. Giddens*, 295 Va. 607, 612-13 (2018).

Because the qualifications for an expert witness in Code § 37.2-904(B) are procedural — not substantive or jurisdictional — requirements pursuant to Code § 37.2-905.1, they should be construed under the substantial-compliance standard.[9] The rule of lenity plays no role in the analysis because it has been wholly supplanted by the 2007 enactment of Code § 37.2-905.1.

b.

Even if the rule of lenity had not been supplanted by Code § 37.2-905.1, the rule does not support Baughman's interpretation of Code § 37.2-904(B). The rule of lenity "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *Shular v. United States*, 140 S. Ct. 779, 787 (2020) (citation omitted). Put another way, the rule of lenity "comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 298 (2012) (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)).

Once the rule of lenity is placed in its proper analytical sequence, the rule cannot be "invoked by a grammatical possibility" that raises a manifestly "implausible reading" of the legislative purpose. *Caron v. United States*, 524 U.S. 308, 316 (1998). "The rule of lenity serves only to resolve genuine ambiguities and 'does not abrogate the well recognized canon that a statute . . . should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language.'" *Fitzgerald v. Loudoun Cnty. Sheriff's Off.*, 289 Va. 499, 508 n.3 (2015) (quoting *Cartwright v.*

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[9] The majority cites *Commonwealth v. Allen*, 269 Va. 262, 273 (2005), for the proposition that a "witness *must* satisfy the statutory criteria in order to testify as an expert" at an SVPA proceeding. *See ante* at 6 (emphasis in original). The apparent inference is that a "must" command is definitionally substantive not procedural. A host of procedural "must" commands throughout the Code of Virginia, however, renders this inference unconvincing. At any rate, because *Allen* was decided before the 2007 enactment of Code § 37.2-905.1 (stating that "[t]he provisions of §§ 37.2-903, 37.2-904, and 37.2-905 are procedural and not substantive or jurisdictional"), *Allen* has little or no relevance to the analysis.

Commonwealth, 223 Va. 368, 372 (1982)). After all, "most statutes are ambiguous to some degree," *Muscarello v. United States*, 524 U.S. 125, 138 (1998), and the "mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable," *Smith v. United States*, 508 U.S. 223, 239 (1993).

For the reasons I previously discussed, *see supra* at 14-16, the "traditional canons of statutory construction," *Shular*, 140 S. Ct. at 787, do not support Baughman's attempt to redefine an expert's qualifications to include the identity of the party hiring the expert. The concepts are wholly unrelated, both in the vocabulary of the common law and in the text of the SVPA. The rule of lenity — even if it were applicable to this case — does not require us to conjoin such dissimilar concepts into one awkward amalgamation.

C.

Baughman's argument on appeal suffers from one last, but equally fatal, flaw. Even if the trial court erred in permitting Dr. Sjolinder to testify at the probable-cause hearing, the error was harmless because the trial court could have found probable cause without Dr. Sjolinder's testimony.

1.

Any error that does not implicate the trial court's subject matter jurisdiction is subject to harmless-error analysis because "Code § 8.01-678 makes 'harmless-error review required in *all* cases.'" *Commonwealth v. White*, 293 Va. 411, 420 (2017) (citation omitted). "[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless," lest such courts "retreat from their responsibility, becoming instead 'impregnable citadels of technicality.'" *United States v. Hasting*, 461 U.S. 499, 509 (1983) (alteration and citation omitted). Absent an error of constitutional magnitude, "no judgment shall be arrested or reversed" if "it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached." Code § 8.01-678.

Code § 37.2-906(E) provides that an expert's opinion "shall not be dispositive of whether the respondent is a sexually violent predator." We have previously held, in the context of an SVPA commitment trial, that "the issue is not whether an expert must express an opinion that an SVPA commitment respondent is likely to commit future sexually violent acts in order for the trier of fact to find that the respondent is a sexually violent predator," but instead, "the issue is whether the record as a whole supports such a determination by the trier of fact by clear and

convincing evidence." *DeMille v. Commonwealth*, 283 Va. 316, 324 (2012). If a trial court can deem a respondent to be a sexually violent predator at trial without an expert opinion finding such and by instead looking at the entire record, it thus follows, a fortiori, that a trial court can find probable cause without an expert opinion since the standard for probable cause is lower than the clear-and-convincing standard required at a commitment trial. *Cf. Evans v. Commonwealth*, 290 Va. 277, 287 (2015) (recognizing that probable cause is a standard even "less demanding than a standard requiring a preponderance of the evidence" (citation omitted)).

Any error of the trial court at the probable-cause hearing would only concern the admission of Dr. Sjolinder's *testimony*, not the admission of her mental health evaluation of Baughman. Code § 37.2-906(E) provides that an "expert witness may be permitted to testify at the probable cause hearing" if that expert "meets the qualifications set forth in subsection B of § 37.2-904," but no limitations are imposed on the admission of mental health evaluations at the probable-cause hearing to demonstrate "[t]he details underlying the commission of an offense or behavior that led to a prior conviction or charge." Baughman did not contemporaneously object to the admission of Dr. Sjolinder's report at the probable-cause hearing, *see* 1 J.A. at 36,[10] and now cannot challenge the report's admissibility, *see* Rule 5:25.[11]

Dr. Sjolinder's report detailed Baughman's behavior that led to his probation violation, including the relationships that he had developed with several minor boys following the funeral of a family friend's teenage son and including his persistence in contacting two of those minors after being ordered by his probation officer to cease communications with anyone under 18. Dr. Sjolinder's report also provided details surrounding Baughman's prior convictions that demonstrated a pattern of predatory or grooming behavior in his communications. This behavior continued to his most recent interactions with minors, which led to his probation violation and partially revoked suspended sentence. Even without Dr. Sjolinder's testimony, therefore, the

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[10] Seeking to avoid this conclusion, Baughman argues that the report was admitted before it became clear in Dr. Sjolinder's cross-examination that she had not been designated by the Commissioner. That is true, but Baughman nevertheless failed to make a specific objection to the admission of the report at the end of the probable-cause hearing or in his motion to reverse the finding of probable cause. Baughman's argument was solely focused on the *testimony* of Dr. Sjolinder. *See* 1 J.A. at 151-59, 367-79; R. at 559-74.

[11] The majority fails to address the absence of any contemporaneous objection to the report's admissibility or the absence of any limitation on the admissibility of mental health evaluations entered into the evidence at the probable-cause hearing under Code § 37.2-906(E).

trial court could have found probable cause that Baughman was a sexually violent predator based on the totality of the evidence presented by the Commonwealth.

2.

Finally, any error regarding the admission of Dr. Sjolinder's testimony at the probable-cause hearing is meritless because Baughman received "a fair *trial on the merits* and substantial justice has been reached," Code § 8.01-678 (emphasis added). Even if Baughman's interpretation of Code § 37.2-904(B) were correct and experts must be designated by the Commissioner to be qualified to testify, this conclusion does not apply to expert testimony *at trial*. The statute governing commitment trials permits "*any* expert" to testify at trial "[i]f he meets the qualifications set forth in subsection B of § 37.2-904 *or* 37.2-907." Code § 37.2-908(C) (emphases added). Code § 37.2-907(A) provides the qualifications for experts employed by or appointed to assist the respondent and mirrors the language of Code § 37.2-904(B) except for the phrase "designated by the Commissioner." Because "any expert," for either the respondent or the Commonwealth, may testify if he meets the qualifications listed in *either* Code § 37.2-904(B) *or* Code § 37.2-907, being designated by the Commissioner is not a qualification to testify at trial.

Criminal law provides a persuasive harmless-error analogy. A grand jury must find "probable cause" before deeming an indictment a "true bill." Code § 19.2-191(1). But a later trial ending in a petit jury verdict of guilty beyond a reasonable doubt renders harmless any earlier defective probable-cause determination. Under settled law, "any error in the grand jury proceeding connected with the charging decision" should be deemed "harmless beyond a reasonable doubt" because the "petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *United States v. Mechanik*, 475 U.S. 66, 70 (1986).[12] Applying that criminal analogy to this civil case, any evidentiary error committed by

[12] *See also United States v. Higgs*, 353 F.3d 281, 307 (4th Cir. 2003) (holding that "any alleged indictment error" affecting the grand jury's probable-cause determination "was harmless beyond a reasonable doubt" in light of the "verdict ultimately obtained from the petit jury"); *Bell v. Commonwealth*, 264 Va. 172, 191 (2002) (finding no error in an indictment when "the petit jury's subsequent guilty verdict demonstrate[s] that there was probable cause to charge [the defendant] and that he was in fact guilty as charged beyond a reasonable doubt"). *See generally* 7 Wayne R. LaFave et al., Criminal Procedure § 27.6(b), at 132-33 (4th ed. 2015).

the trial court in finding probable cause was rendered harmless by the jury's later verdict finding by clear-and-convincing evidence (a far higher standard than probable cause) that Baughman was a sexually violent predator.[13]

III.

In sum, the jury in this case found that Baughman was a sexually violent predator who "finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts." Code § 37.2-900. The majority vacates this verdict on the ground that the Commonwealth's expert was not qualified to provide an expert opinion because she was hired by

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[13] The majority challenges *Mechanik* by pointing to Justice O'Connor's separate opinion (concurring only in result) which narrowly focused on the error's effect on the charging decision as opposed to the ultimate verdict. *See ante* at 9. I think it better to focus on the broader rationale of the *Mechanik* majority opinion. Either way, it does not matter here. The alleged error in the Baughman's case did not have any prejudicial effect on the SVPA analogue to a grand jury indictment. As noted earlier, Dr. Sjolinder's written report was introduced without objection as evidence at the probable-cause hearing. *See supra* at 21. By itself, the report provided sufficient probable cause even without her testimony. I thus disagree with the majority's assertion that Dr. Sjolinder's testimony "provided the only means for the trial court to determine Baughman's mental state," and thus, the error in admitting her testimony "clearly" prejudiced Baughman and "substantially influenced the trial court's determination of probable cause." *Ante* at 10.

I also disagree with the majority's view that *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), sidelined the majority opinion in *Mechanik*. *See ante* at 9-10. The holding of *Mechanik* has never been overruled. It held that the alleged admission of inadmissible evidence before a grand jury was not structural error, and thus, "the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation." *Mechanik*, 475 U.S. at 72-73. What *Bank of Nova Scotia* added was the consistent caveat that certain structural errors (typically egregious constitutional violations) would not be considered harmless merely because the petit jury later convicts. *See Bank of Nova Scotia*, 487 U.S. at 256 ("These cases may be explained as isolated exceptions to the harmless-error rule."). The takeaway, as Professor LaFave points out in his discussion of *Mechanik* and *Bank of Nova Scotia*, is that "most grand jury error is *necessarily* harmless beyond a reasonable doubt if followed by an otherwise valid conviction," and even if the error is raised prior to trial, "relief may be available, but only if the traditional standard for harmless error was satisfied." 7 LaFave, *supra* note 12, § 27.6(b), at 132 (emphasis in original). None of these concerns are implicated in the present case. Baughman makes no assertion of structural error. He merely challenges the admission of Dr. Sjolinder's testimony. That is not enough under *Mechanik* given the overwhelming evidence presented at the final evidentiary stage of the same proceeding. What is more, under *Bank of Nova Scotia*, even if it were error to admit Dr. Sjolinder's testimony at the probable-cause hearing, the unobjected-to admission of her report at the probable-cause hearing rendered that alleged error harmless.

the Attorney General of Virginia instead of designated by the Commissioner of the Department of Behavioral Health and Developmental Services.

In my opinion, the majority errs in three respects: (i) the expert was more than qualified to provide an expert opinion on behalf of the Commonwealth, and it does not matter who hired her to do so; (ii) the Commonwealth substantially complied with Code § 37.2-904(B)'s procedural requirements for an expert; and (iii) any error by the trial court at the probable-cause hearing was harmless given the weight of the other evidence presented by the Commonwealth and the jury's subsequent verdict at trial.

For these reasons, I respectfully dissent.[14]

This order shall be certified to the Circuit Court of Arlington County.

A Copy,

Teste:

Clerk

[14] Given the plethora of novel questions of law presented in this appeal, I believe this order (though I disagree with it) should be published and given the precedential weight it deserves.