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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF RONALD MJ GREGG,

RESPONDENT,

Appellate Case No. 2022-001710

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

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STATE'S QUESTION PRESENTED

Did the Court of Appeals err in reversing Judge Jefferson's findings and conclusion regarding the reliability and admissibility of the PPG test results in light of the extensive evidence before Judge Jefferson from a well-qualified expert that established the PPG test has been thoroughly researched and peer reviewed, is accepted as a valid medical test by governmental agencies and a large insurance company, and is generally accepted in the mental health community?

RESPONDENT'S COUNTERSTATEMENT OF THE QUESTION

Did the Court of Appeals err when it determined that the trial judge's admission of evidence regarding a penile plethysmograph test administered to appellant with a stimulus set that did not meet the threshold reliability requirement for purported scientific evidence?

STATEMENT OF THE CASE

The State brought this action under the Sexually Violent Predator Act seeking appellant Ronald M. J. Gregg's confinement in a secure facility and on November 18, 2019, appellant was tried in Charleston County before the Honorable Deadra L. Jefferson and a jury. Nov. 18, 2019, R. 1. Jim Bogle, Jr. represented the State. Nov. 18, 2019, R. 2. James Falk represented appellant. Nov. 18, 2019, R. 2. The jury found appellant was a sexually violent predator and Judge Jefferson ordered him committed. R. 537, l. 14 – 21. Appellant filed an appeal.

A panel of the Court of Appeals consisting of Judges Thomas, McDonald, and Hewitt reversed in an unpublished opinion. In the Matter of Gregg, Op. No. 2022-UP-336 (S.C. Ct. App Aug. 10, 2022). After the State's petition for rehearing en banc was denied, it sought review at this Court.

STANDARD OF REVIEW

The evidentiary issue in this case is reviewed under the abuse of discretion standard. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003).

ARGUMENT

The Court of Appeals correctly determined that the trial judge's admission of evidence regarding a penile plethysmograph test administered to appellant with a stimulus set that did not meet the threshold reliability requirement for purported scientific evidence.

The State seeks a blanket decision from this Court that all PPG evidence is admissible. The problem with the State's request is that question was not litigated at trial nor before the Court of Appeals. The Court of Appeals correctly focused on the specific portion of the PPG that was given to Respondent—the stimulus set. As the State's expert and lawyer admitted, the stimulus set used on Respondent had never been subjected to peer review and the Court of Appeals properly found that the PPG—as given in this case—was unreliable. This Court should not take the State's bait and grant certiorari to consider some sweeping pronouncement on the admissibility of PPG evidence. Perhaps that case will come before this Court in the future, but Respondent's case is not the vehicle for that determination.

To understand why no need exists to grant certiorari, it is first important to understand the PPG. The State spends the vast majority of its petition for certiorari describing the hardware used in a PPG and how the hardware has been peer-reviewed and that the hardware is reliable. But this case concerns the software—the stimulus set. Much like with computers, the hardware can be completely reliable, but if the software is flawed it will not work.

The hardware of a PPG is the strain gauge a test subject is forced to place around their penis and the devices used to measure any movement or growth of the penis during the test. The test claims to measure human arousal by measuring changes in penile circumference. The software in this case was the Real Child Voices stimulus set. The stimulus set is what the test subject listens to or watches while his penis is strapped into the machine.

As the Department of Mental Health's examiner, Dr. Marie Gehle, stated about the stimulus set, without any research studies or peer review of the stimulus set, "we don't know if what he says he's measuring he's actually measuring." R. 80, l. 16 – 25. An extreme example to illustrate this point would be if a PPG examiner claimed that the test subject got an erection from a stimulus set regarding sexual activity by children, but the stimulus set also contained adult pornography. Dr. Gehle provided a more nuanced example, explaining, "the more arousing the stimuli set is, the harder it is to differentiate what they're actually getting aroused to." R. 85, l. 5 – 86, l. 12. Dr. Gehle's example was that a person could be aroused by the mention of the word "breasts" regardless of whether the subject was six years old or sixty years old. R. 86, l. 5 – 12. The PPG is therefore only as reliable as its stimulus set.

The Court of Appeals correctly focused on this issue and did not issue any grand ruling (in its unpublished opinion) about the general admissibility of PPG testing. It correctly found a complete lack of peer review regarding the specific test given to Respondent. The State's expert, Dr. Gottfried, whose lab created and sells the stimulus set given to Respondent, admitted that the Real Child Voices stimulus set had never been subjected to a published peer review article. R. 120, l. 2 – 121, l. 14. She claimed that MUSC was on the verge of publishing its data, but had not yet been submitted for peer review. R. 120, l. 2 – 121, l. 14. She also testified about presentations at conferences with "peer reviewed abstracts." R. 133, l. 19 – 136, l. 9.

Dr. Gottfried admitted in camera that no peer reviewed studies had been done on the Real Child Voices stimulus set regarding its ability to accurately predict whether people have coercive paraphilic disorder. R. 330, l. 4 – 8. Nor did she know whether another stimuli set used during appellant's test had been connected with coercive paraphilic disorder in any peer reviewed research. R. 330, l. 9 – 24. Dr. Gottfried could not quantify how much of her diagnosis of coercive

paraphilic disorder was based on the PPG test given to appellant. R. 334, l. 1 – 20. Respondent’s attorney asked and Dr. Gottfried answered:

Q. Okay. Okay. So have there been any peer-reviewed studies of the Real Child Voices Stimulus Set on its ability to accurately predict people who have a coercive paraphilic disorder?

A. No, not to my knowledge.

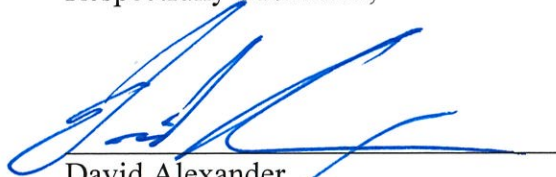
R. 330, l. 4 – 8. During argument after Dr. Gottfried’s testimony, the attorney for the State said, “I’ll concede she did not specifically represent peer review for the Real Child Voices, but she did represent peer review and multiple articles on the general acceptance of the PPG, the concept as a whole, the fact that it shows arousal.” R. 162, l. 9 – 14.

The first factor in admission of scientific evidence is whether it has been published and subjected to peer review. Watson v. Ford Motor Co., 389 S.C. 434, 449-50, 699 S.E.2d 169, 177 (2010); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). The stimulus set used in this case wholly failed this part of the test and the Court of Appeals properly recognized this fact. The State simply failed to meet its burden as the proponent of the Real Child Voices stimulus set. The Court of Appeals properly reversed because of the trial court’s failure to uphold its gatekeeping role. See State v. Phillips, 430 S.C. 319, 334-35, 844 S.E.2d 651, 659 (2020). This Court need not grant certiorari to review the rote application of the rules regarding the admission of scientific evidence in an unpublished opinion.

CONCLUSION

For the foregoing reasons, the State's petition for certiorari should be denied.

Respectfully Submitted,



David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

This 19th day of January, 2023.