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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
The Honorable Jennifer B. McCoy, Circuit Court Judge
Court of Appeals Appellate Case No. 2020-001551
S.C. Ct. App. Op. No. 2022-up-452
On Petition for Writ of Certiorari to the Court of Appeals
Supreme Court Appellate Case No. 2023-000249

In the Matter of the Care and Treatment
of Kevin Lamar Wright,

Petitioner.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the court of appeals properly find the evidence supported Judge McCoy's findings and conclusion there was no probable cause to believe Petitioner's mental status had so changed he is safe to be at large?

STATEMENT OF THE CASE

In April 2017, a jury found Petitioner Kevin Lamar Wright is a sexually violent predator beyond a reasonable doubt, and he was civilly committed pursuant to the South Carolina Sexually Violent Predator Act (SVPA). As required by the SVPA, the Department of Mental Health (DMH) reviewed Petitioner's mental status annually, and in July 2019, a DMH psychologist issued an annual review report concluding Petitioner's mental status had not so changed he is safe to be at large.

After an evidentiary hearing, at which Petitioner appeared and was represented by counsel, the Honorable Jennifer B. McCoy, Circuit Court Judge, found there was no probable cause to believe Petitioner's mental status had so changed he is safe to be at large, and continued Petitioner's civil commitment for long term control, care and treatment. This appeal followed.

In an unpublished opinion filed December 14, 2022, the court of appeals affirmed Judge McCoy's findings. In re Care and Treatment of Kevin Lamar Wright, Op. No. 2022-UP-452 (S.C. Ct. App., filed December 14, 2022). Petitioner filed a Petition for Rehearing on December 28, 2022, which the court of appeals denied by Order filed January 20, 2023. Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals on February 21, 2023, seeking review by this Court.

STATEMENT OF FACTS

In April 2017, a jury found beyond a reasonable doubt Petitioner met the criteria for civil commitment as a sexually violent predator pursuant to the SVPA, and he was committed to DMH's Sexually Violent Predator Treatment Program (SVPTP) for long term control, care and treatment. Thereafter, as required by the SVPA, DMH reviewed Petitioner's mental status annually, and each review found Petitioner's mental status had not so changed he is safe to be at large.

Petitioner sought, and was granted, an independent evaluation after DMH's 2018-2019 annual review report recommended continued confinement for treatment. Petitioner retained E. Selman Watson, Ph.D, to perform the independent evaluation, which was not completed until August 2020, and Petitioner sought release from the SVPTP without DMH authorization.[1] In the interim, DMH issued a 2019-2020 annual review report prepared by Christopher Gillen, Ph.D., which also recommended continued confinement for treatment. With all parties' consent, the court conducted an annual review evidentiary hearing via video/Webex on October 2, 2020.

Petitioner presented Dr. Watson, who was qualified as an expert in forensic psychology and sexually violent predator evaluations. Dr. Watson testified he interviewed Petitioner several times (July 2018, June 2019 and February 2020) for a total of seven to eight hours, during which they discussed Petitioner's sex offender history, his mental health and legal history, his progress in treatment, and the exercises included in each level of the treatment program. Dr. Watson also administered a couple of psychological tests, and reviewed "group notes" provided to him in June 2020. (Record on Appeal [R.], pp. 13-16).

[1]The DMH Director did not authorize Petitioner to file a release petition. *See* S.C. Code Ann. §44-48-120(A) (2018) (Director certifies in writing the resident is safe to be at large and authorizes resident to petition the court for release).

Dr. Watson opined that Petitioner's mental status had changed such that he was not likely to reoffend sexually if released. He further testified that Petitioner is a pedophile, but he did not believe Petitioner ever met the statutory criteria for civil commitment under the SVPA. He stated Petitioner has only a few dynamic risk factors for reoffending, but does still have the dynamic risk factor of "emotional congruence with children." (R., pp. 16-21).

As to Petitioner's future plans if released, Dr. Watson testified Petitioner "mentioned he would like to live at Shields Ministries," but Dr. Watson understood that facility might not accept sex offenders as residents. Dr. Watson further testified there was a family member Petitioner "might be able to live with," Petitioner had expressed an interest in continuing treatment on an out-patient basis, and Petitioner would be on lifetime GPS monitoring if released. Dr. Watson stated he "would hope" Petitioner "would be able to find a mental or an accountability partner" who "would be available to him if he were to have any change in his dynamic risk factors." (R., p. 21).

Dr. Watson stated Petitioner actively participated in group therapy sessions and had never missed a group meeting or refused an assignment while in the SVPTP. Petitioner provided Dr. Watson with "a huge binder full of homework assignments, articles, scales that he submitted, [and] coping log[s]." Based on the contents of the binder and his interviews with Petitioner, Dr. Watson opined Petitioner was "learning skills to manage" his pedophilic urges if released, and he would learn additional skills if he continued in an outpatient treatment setting. He stated Petitioner had certain cognitive disorders when he entered the SVPTP, but now he "feels shameful," and "feels sorry that he engaged in [pedophilic] behavior." (R., pp. 21-27).

On cross-examination, Dr. Watson stated there were some annual review reports and documents from the original commitment proceeding he did not review because "they were not

made available" to him. He acknowledged he performed a "brief psychological" evaluation of Petitioner in 2011 while Petitioner was in the South Carolina Department of Corrections (SCDC), which included a personality assessment indicating Petitioner strongly underreported symptoms and concerns, and he tended "to present himself in an overly positive light." He also acknowledged at least one of the multiple SVPA evaluation reports he reviewed specifically referred to that 2011 evaluation.

In spite of his 2011 findings, Dr. Watson testified he "thought [Petitioner] had a genuine interaction" with him during the evaluation, and he did not think deception was part of Petitioner's personality. In addition, even though his report stated Petitioner did "not appear overly deceptive" during the interviews, Dr. Watson testified he "just didn't find [Petitioner] to be a deceptive individual." (R., pp. 28-44).

Dr. Watson ultimately acknowledged there were discrepancies between Petitioner's sex offense disclosures to previous evaluators and his disclosures to Dr. Watson about those offenses. One significant disclosure involved the ending of Petitioner's relationship with a girlfriend, which Petitioner claimed led to some of his sexual offenses. He told previous evaluators the relationship ended when the girl moved away, but he told Dr. Watson it ended when he caught her having sex with his best friend.

Another discrepancy regarded a behavioral infraction Petitioner committed in the SVPTP involving possession of contraband, specifically pictures of children. Petitioner told Dr. Watson the infraction involved possession of one magazine containing a picture of a child, but the available documentation indicated Petitioner possessed six magazines and a news article, all containing pictures of children of various ages. Dr. Watson stated he did not recall an annual review report that discussed a behavioral infraction involving Petitioner sharing with another resident a floppy

disk that included pictures of women in G strings, pictures of children, pornographic movie titles and descriptions, some of which described deviant conduct. (R., pp. 44-51).

Over the course of the four interviews with Dr. Watson, with the last one in February 2020, Petitioner told Dr. Watson he never missed a group meeting or refused an assignment. Dr. Watson acknowledged the most recent annual review report by Dr. Gillen, which Dr. Watson received two weeks before the probable cause hearing, indicated Petitioner had five unexcused absences from group meetings in the 2019-2020 review period. Dr. Watson testified he did not recall any annual review reports indicating Petitioner got another resident to complete some of Petitioner's homework assignments and then presented them as his work. (R., pp. 51-52).

Dr. Watson testified there are thirteen identified risk factors for sexually reoffending, and acknowledged a person does not have to have all thirteen risk factors to be considered a risk to reoffend. Dr. Watson did not address specific dynamic risk factors in his report, but previous evaluations identified seven dynamic risk factors associated with Petitioner, including: sexual preoccupation; a sexual preference for pubescent or prepubescent children; offensive supportive attitudes; an emotional congruence with children; a lack of emotionally intimate relationships with adults; poor problem solving; and resistance to rules and supervision. Dr. Watson agreed with the listed dynamic risk factors, but testified Petitioner no longer exhibited some of them and had progressed on the others. (R., pp. 52-61).

Dr. Watson admitted he did not attempt to discuss Petitioner's mental status or treatment progress with any treatment providers or the doctors who completed the pre-commitment or annual reviews regarding Petitioner. His opinion was primarily based on Petitioner's statements during the four interviews, Dr. Watson's assessments of the written documents he reviewed, and the binder of "work" Petitioner provided him as evidence of Petitioner's participation in and

commitment to treatment. Dr. Watson also ultimately admitted the underlying premise of his opinion was his belief Petitioner never met the criteria for commitment under the SVPA, which was a factor in every part of the evaluation he performed. (R., pp. 62-64).

The State presented Dr. Gillen, who was also qualified as an expert in forensic psychology. Dr. Gillen testified he was assigned to complete Petitioner's annual review and had no previous contact with Petitioner. His evaluation protocol includes an extensive file review (original commitment documents, criminal records, SCDC records, SVPTP treatment records that include treatment assignments, group notes, case management notes, treatment plans and annual treatment summaries), and a clinical interview of the individual he is evaluating. In addition, he contacts collateral sources as necessary, and reviews prior annual review reports. (R., pp. 71-89).

After reviewing all relevant records, Dr. Gillen interviewed Petitioner for approximately three hours on July 10, 2020. During the interview, Petitioner recounted his offenses against six prepubescent girls, and stated he started molesting the children because of feelings of betrayal and loneliness, fear of rejection and perceived rejection, and feelings of trust at the children's level. Petitioner also endorsed several offense supportive attitudes, including a belief children wanted to engage in sex with him, or they liked sex, or their wearing of certain types of clothing indicated they were interested in sex with him, and he had difficulty controlling his sexual arousal to children. Petitioner also "explicitly endorsed a sexual attraction to two of the victims." (R., pp. 89-91).

Dr. Gillen also reviewed records regarding Petitioner's behavioral infractions at the SVPTP, which included a 2018 citation for an interpersonal relationship with another SVPTP resident that was deemed problematic and inappropriate, and he possessed letters containing

romantic content from the resident. He was also cited in 2018 for possessing several newspapers and magazines that contained pictures of children. (R., pp. 91-92).

During the 2019-2020 review period, Petitioner was cited in 2020 for exchanging contraband material with the same resident, which was captured on video, even though they had been physically separated within the facility, and for possessing another depiction of a child. Dr. Gillen found these recurring behavioral issues problematic in light of Petitioner's history. (R., pp. 91-94).

Dr. Gillen testified he completed the Static-99R and Static-2002R actuarial risk assessment tools, and Petitioner scored a four on the Static-99R, and a five on the Static-2002R. He stated the two scores are combined to generate an absolute risk number when compared to a specific reference sample of sex offenders who were charged or convicted of a new sex offense within a designated timeframe. He testified the risk assessment tools do not make any allowances for unreported offenses, so the absolute risk score generated is 'likely an underestimation [of actual risk] given that it only follows a five year period and it only counts with charges and convictions." (R., pp. 94-96).

Dr. Gillen further testified Petitioner has multiple dynamic risk factors that increase his likelihood of reoffending, including a sexual preference for prepubescent or pubescent children, sexual preoccupation, dysfunctional and sexualized coping, poor problem solving, and resistance to rules and supervision. As to his sexual preoccupation with prepubescent and pubescent children, the 2019-2020 treatment records included a notation Petitioner "denied that pedophilic disorder was a disorder or that his sexual behaviors were a product of or influenced by that diagnosis." In addition, Dr. Gillen stated Petitioner "hasn't learned any specific arousal management techniques in his treatment to date or at least to the time I reviewed his record that would allow him to manage

that deviant arousal when he is exposed to high risk situations out in the community." (R., pp. 96-98).

As to Petitioner's "lack of intimate emotional relationships and emotional congruence with children," Petitioner told Dr. Gillen "these were resolved and historical issues in his life," but he was unable to state how or why the issues were resolved, or talk about any strategies he developed in treatment to work on them, which was problematic in light of his behavioral record involving another resident in the treatment program. Petitioner also stated he tried to form relationships with and talk to treatment program staff members, which was "directly contradictory to what is reported in the record about his engagement and social interaction with staff on the unit."

Petitioner did identify specific coping skills he learned in treatment to deal with his risk factor of dysfunctional and sexualized coping, but he admitted "those skills have not helped him target some of the specific emotions that were most directly related with his offending to include feelings of perceived rejection, loneliness, [and] fear of rejection." Dr. Gillen testified Petitioner's difficulty managing those emotions "was one of the reasons that led [Petitioner] to sexually act out against children," and the coping skills Petitioner had developed "have insufficiently addressed those." Independent ability in the community to identify those types of thoughts, recognize them as distortions, challenge them and restructure them is "what is going to be important for someone like [Petitioner]." (R., pp. 98-100).

As to Petitioner's "poor problem solving" risk factor, Dr. Gillen testified the while Petitioner had made some progress on that risk factor and seemed to understand some of the factors involved in his sexual offending, Dr. Gillen stated Petitioner needed further work on developing an ability "to apply those risk factors to his current behavior, future risks," . . . and "come up with a wide variety of potential solutions to manage high-risk situations." Specifically, while Petitioner

showed some insight into potential barriers in the community (i.e., his tendency to be stubborn or feeling ignored), he was unable "to articulate how he would overcome those barriers out in the community outside of relying on external supports and constraints." (R., pp. 100-101).

Dr. Gillen testified Petitioner's participation in treatment was "variable" during the period Dr. Gillen reviewed. A positive indication was Petitioner "largely attending his treatment groups outside of those five unexcused absences that were documented in the record," "[a]t times he is providing relevant commentary in groups," and there were "a few indications that he was able to link up some of his feedback with his offense history." (R., pp. 101-102).

On the negative side, there were "instances spanning the review period that talked about minimal engagement," and staff asked Petitioner to increase the consistency of his participation. Also, there were some notable problems during the review period, including Petitioner shutting down emotionally and stopping his participation when a peer or facilitator challenged him about sexually problematic behaviors, or the discussions turned to Petitioner's own offenses. (R., pp. 102-103).

Dr. Gillen testified Petitioner needs to continue in the treatment program to work on developing arousal management techniques that are directly relevant to his sexual attraction to prepubescent and pubescent children, and how to manage some of that arousal when it becomes difficult to handle out in the community where he has access to children. Petitioner also needs to develop strategies and skills to handle his feeling of perceived rejection, betrayal and inadequacy, and work on problem solving beyond "simply avoiding high-risk situations and relying on others to further develop coping skills." (R., pp. 103-105).

Dr. Gillen diagnosed Petitioner with pedophilic disorder. He testified to a reasonable degree of psychological certainty that Petitioner's mental abnormality "has not so changed that he

is safe to be at large," if released, he "is likely to engage in acts of sexual violence," and Petitioner "needs to remain in the program for further treatment." (R., pp. 105-108).

Judge McCoy found there was sufficient evidence presented to support the State's contention Petitioner still met the criteria for confinement and continued treatment under the SVPA. Judge McCoy discussed the testimony of both Dr. Watson and Dr. Gillen, and found Dr. Gillen was more credible. In addition, she "carefully considered the documents received into the record, and the arguments of counsel." Based on her review of the record and the arguments, Judge McCoy found Petitioner failed to meet his burden of proof to establish probable cause that his mental abnormality had so changed he is safe to be at large, and ordered his continued confinement in a DMH secure facility for long term control, care and treatment. (R., pp. 165).

This appeal followed. The court of appeals affirmed, finding the evidence reasonably supported Judge McCoy's findings and conclusion Petitioner failed to establish probable cause to order a trial on the issue of whether his mental abnormality had so changed he is safe to be at large. Petitioner now seeks review of the court of appeals decision by this Court.

ARGUMENT

The court of appeals properly affirmed Judge McCoy's finding of no probable cause to believe Petitioner's mental status had so changed he is safe to be at large.

Petitioner contends this Court's review of the court of appeals opinion in this case is necessary because there is no law regarding "the quantum of proof necessary" to establish probable cause at an annual review probable cause hearing. He further asserts that once a committed person produces evidence at the probable cause hearing, the circuit court's finding of no probable cause to order a release trial is a denial of due process. In essence, Petitioner's assertions ignore case law regarding probable cause in SVPA proceedings and the circuit court's role in a statutorily required annual review hearing.

As a threshold matter, Petitioner's due process claim is not preserved for review by this Court. Contrary to his assertion the issue was raised in his rehearing petition, there is **no** reference to an alleged denial of due process by Judge McCoy's finding of no probable cause to order a trial. Further, Petitioner did not raise a due process issue before Judge McCoy or in his brief before the court of appeals. (Final Brief of Appellant, pp. 1-10). Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal. *See* State v. Varvil, 338 S.C. 335, 526 S.E.2d 248, 250 (Ct. App. 2000). Therefore, it is not before this Court for consideration.

At the commencement of proceedings under the SVPA, the State must establish probable cause to believe the person has a mental abnormality or personality disorder that makes him likely to commit future acts of sexual violence if not confined for long term control, care and treatment. S.C. Code §44-48-80 (2018). "'In the context of probable cause to believe someone to be a sexually violent predator, probable cause requires that the evidence presented would lead a reasonable person to believe and conscientiously entertain suspicion that the person meets the

definition of a sexually violent predator.'" In re Care and Treatment of Chandler, 382 S.C. 250, 676 S.E.2d 676, 680 (2009) (*quoting* In re Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118, 122–23 [Ct. App. 2007]). "Probable cause 'does not demand any showing that such a belief be correct or more likely true than false.'" Brown, 643 S.E.2d at 123 (*quoting* Texas v. Brown, 460 U.S. 730, 742 [1983]). "The very term itself, 'probable cause,' does not import absolute certainty." *Id.* at 118, 122.

Commitment under the SVPA requires a determination beyond a reasonable doubt the person has a mental abnormality or personality disorder that makes him likely to engage in future acts of sexual violence if not confined for long term control, care and treatment. S.C. Code §44-48-100 (2018). If committed, the person is entitled to annual reviews of his mental status, and probable cause hearings on those reviews. At an annual review hearing, the committed person has the burden to present evidence that his mental abnormality or personality disorder has so changed he is safe to be at large, and circuit court must determine whether the person's evidence would lead a reasonable person to believe and conscientiously entertain a suspicion the person's mental status has so changed he is now safe to be at large. S.C. Code §44-48-110 (2018); In re Care and Treatment of Tucker, 353 S.C. 466, 578 S.E.2d719, 722 (2003).

Unlike the probable cause determinations under S.C. Code §44-48-80 (2018) (pre-commitment), which take place prior to any mental health evaluations and are primarily based on available records, making a probable cause determination in annual review hearings necessarily requires consideration of more than the mere existence of evidence. Rather, the court must consider the credibility of the witnesses and evidence presented. *See* State v. Keith, 356 S.C. 219, 588 S.E.2d 145, 147 (Ct. App. 2003) (probable cause determination requires a practical, common-sense decision based on the totality of evidence presented, "including the veracity and basis of

knowledge of persons supplying information"). Contrary to Petitioner's contention there is no South Carolina case law addressing the "quantum of proof" necessary to establish probable cause at an annual review hearing, that issue was directly addressed in Tucker.

In Tucker, there was conflicting expert evidence regarding whether Tucker had progressed in treatment sufficiently that his mental status had so changed he was safe to be at large. This Court affirmed, finding the evidence presented "reasonably" supported the circuit court's finding of no probable cause to believe Tucker was safe to be at large. 578 S.E.2d at 720-722. In short, the circuit court had discretion to weigh the evidence in determining whether probable cause existed, and this Court reviewed that exercise of discretion through the lens of "reasonable" support in the record.

Petitioner maintains the mere fact he presented expert testimony saying he was safe to be at large mandates a finding of probable cause, and Judge McCoy's role at the annual review hearing was limited to the circuit court's gatekeeper role to determine whether either party's expert evidence is admissible, *i.e.*, whether the witnesses are qualified to testify as experts and the underlying science on which their opinions is reliable. This argument both undermines the purpose of an annual review hearing under the SVPA, makes the hearing a meaningless exercise, and renders the presiding judge irrelevant by reducing the probable cause determination to a mere ministerial act. Such a result would be absurd in light of the SVPA's express public safety purpose.

Petitioner's reliance on In re Sipe, 239 P.3d 871 (Kan. Ct. App. 2010), and In re Miles, 276 P.3d 232 (Kan. Ct. App. 2012), is unavailing. In both cases, the lower court's annual review probable cause determinations were based solely on the reports prepared and submitted by experts for the state and the committed person, and the appellate court applied a *de novo* standard of review. Sipe, 239 P.3d at 877; Miles, 276 P.3d at 236.

In South Carolina, SVPA annual review probable cause hearings are generally full evidentiary hearings with witness testimony rather than determinations based solely on expert reports, and South Carolina appellate courts apply a deferential standard of review for circuit court annual review probable cause determinations. *See* Tucker, 578 S.E.2d at 721-722. Given the circuit court's ability to hear direct and cross-examination of witnesses as well as review submitted reports, the circuit court has an inherent ability to consider the credibility and veracity of the evidence before it, and the deferential standard of review recognizes that ability.

Petitioner's reliance on State v. McCuistion, 174 Wash.2d 369, 275 P.3d 1092 (2012) is likewise misplaced. Initially, the Washington statutory requirements for annual review proceedings are very different from the SVPA requirements, the trial court is expressly prohibited from weighing the evidence, and the appellate standard of review is *de novo*. Even with the different statutory and evidentiary requirements and standard of review, however, the Washington Supreme Court found the committed person's presentation of expert evidence alleging he was safe to be at large did not statutorily or constitutionally mandate a full evidentiary hearing regarding his petition for release. *Id.* at 1097-1101.

In this case, Judge McCoy had both Dr. Watson's and Dr. Gillen's written reports, and heard extensive testimony from both experts. Dr. Gillen's report detailed Petitioner's progress in treatment since he entered the treatment program, including specific notes by his direct treatment providers, the current status of his mental abnormality and personality disorder, his numerous dynamic risk factors, and the multiple issues he needed to continue addressing in treatment to reduce his risk of reoffending sexually. Dr. Gillen's report and testimony referenced specific parts of Petitioner's treatment records and called Petitioner's self-serving statements to Dr. Gillen in doubt. Like the expert in Tucker, Dr. Gillen testified that although Petitioner had made some

progress in treatment, there were treatment goals he needed to meet before his mental abnormality and personality disorder would be so changed he could be safe to be at large and released from the SVPTP. Tucker, 578 S.E.2d at 722. (R., p. 166).

In contrast, Dr. Watson relied primarily on Petitioner's version of his treatment progress and current status, reviewed limited records regarding Petitioner's treatment progress that did not include treatment staff notes regarding Petitioner's participation, or lack thereof, in treatment, and he never addressed Petitioner's dynamic risk factors. When asked about reviewing the treatment records, Dr. Watson claimed he only received treatment summaries a couple of months before he issued his report, and he did not receive the staff notes. When pressed, Dr. Watson admitted he did not believe Petitioner ever met the criteria for commitment under the SVPA, which further called his opinion regarding Petitioner's mental status and risk to reoffend sexually into doubt. *See* McCuistion, 275 P.3d at 1101 (expert's declaration that person had never met the criteria for commitment was contrary to the jury's initial determination the person did meet the criteria, and ordering a new trial on the basis of expert's declaration would have required the trial court to discredit the jury's verdict).

The totality of the evidence presented substantiated Dr. Gillen's concerns about Petitioner's self-report regarding his treatment progress and current mental status, as well as Dr. Gillen's opinion that Petitioner's mental status had not so changed he is safe to be at large. The evidence also seriously undermined Dr. Watson's opinion and credibility. Judge McCoy properly considered the totality of the evidence presented, including the veracity and credibility of the witnesses, in concluding Petitioner failed to meet his burden to establish probable cause to believe his mental status has so changed he is safe to be at large, the evidence reasonably supports her findings and conclusion, and the court of appeals properly affirmed.

CONCLUSION

Based on the foregoing and the arguments set forth in the Final Brief of Respondent, the State respectfully submits the Court should deny the Petition for Writ of Certiorari to the Court of Appeals in its entirety.

Respectfully submitted,

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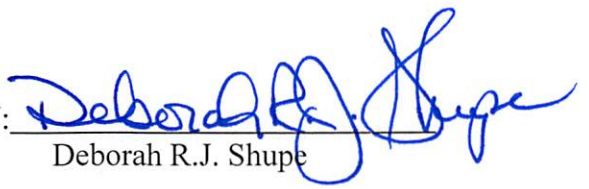
BY: 
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