

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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

BRIEF OF 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.

A panel of the Court of Appeals consisting of Judges Thomas, McDonald, and Hewitt reversed in an unpublished opinion.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, which was granted.

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 properly ruled that the trial judge erred in admitting 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.

Introduction

As predicted in respondent's return to the petition for certiorari, the State seeks a broad pronouncement from this Court that all PPG evidence is admissible in sexually violent predator cases. The issue ruled upon by the Court of Appeals was far more narrow—whether the stimulus set administered to respondent was reliable and admissible.

The Penile Plethysmograph Test and its Treatment by the Courts

The idea of the PPG was invented in communist Czechoslovakia in the 1950s. See Jason R. Odeshoo, Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (Fall 2004) (hereinafter "Odeshoo"). The Odeshoo article gives a thorough history of the PPG. The communist Czech government began using the PPG "to determine the sexual orientation of military recruits claiming to be homosexual for the purpose of avoiding military service." Id. at 7.

As the article notes, "Erotic arousal is surely a very complicated affair, both psychologically and physiologically." Id. at 9-10. The article compares the PPG to other "pseudoscientific practices such as phrenology and physiognomy, which similarly attempted to measure or explain complex psychological phenomena by simple observation of outward appearances." Id.

The First Circuit accurately described the PPG as "invasive" and "controversial." United States v. Medina, 779 F.3d 55, 65 (1st Cir. 2015). The Second Circuit found that the humiliating

nature of the test, its invasiveness, and questionable reliability implicated substantive due process concerns and found that it could not be imposed on a defendant as a condition of his supervised release. See United States v. McLaurin, 731 F.3d 258, 261-64 (2nd Cir. 2013). The McLaurin court wrote, “But we see no reasonable connection between fluctuating penis size and public protection—certainly none strong enough to survive the careful scrutiny that we give to unusual or severe conditions of supervised release.” Id. at 264. See also Galindo v. State, 481 P.3d 686, 691 (Alaska Ct. App. 2021) (“We have previously held that plethysmograph testing is sufficiently intrusive and demeaning as to implicate a liberty interest, and we have repeatedly vacated this condition, or remanded for application of special scrutiny.”).

“Courts generally have held [the PPG] inadmissible to show the presence or absence of pedophilia.” David H. Kaye, David E. Bernstein and Jennifer L. Mnookin, The New Wigmore: Expert Evidence, § 8.8.2 at n. 21 (and cases cited therein). In United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995), the Fourth Circuit held the PPG did not meet the scientific standards for admissibility. The court noted the “extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test.” Id. at 1471.

The Virginia Supreme Court held that an expert’s report that relied on PPG testing was inadmissible, even at a sentencing hearing. Billups v. Commonwealth, 652 S.E.2d 99, 101-02 (Va. 2007). The Billups court approached PPG testing with a critical eye and ultimately concluded it was inadmissible:

Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers not schooled in the articular field under consideration. Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be “scientific,” and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism. That tendency has given rise to frequent complaints of “junk science” in the courts. To

guard against that risk, we continue to require a “threshold finding of fact with respect to reliability of the scientific method offered. . . .”

Id. at 101-02. See also Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000) (“In fact, courts are uniform in their assertion that the results of [PPG] are inadmissible as evidence because there are no accepted standards for this test in the scientific community.”); Gentry v. State, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) (“Given the rejection of [PPG] evidence by other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia.”); Leftwich v. State, 538 S.E.2d 779, 781 (Ga. Gt. App. 2000) (holding defendant could not use PPG results to show he was not a pedophile because PPG was not shown to be reliable).

In Commonwealth v. Ortiz, 100 N.E.3d 790 (Mass. Ct. App. 2018), the court dealt with a defendant attempting to introduce PPG results. The doctor in Ortiz admitted that the stimuli used in the exam are not standardized and that he had used a set of stimuli he developed himself. Id. at 794. The court stated, “For a test such as this, the stimuli used are by definition intrinsic to the result produced. With no standardized guidelines for either the content or even the mechanism of stimulus (audio or visual), the reliability of the procedure appears inherently dubious.” Id. at 797. Like the Court of Appeals in respondent’s case, the Ortiz court saw through the State’s attempt to piggyback the reliability of the software/stimulus set on top of the reliability of the hardware.

The Lack of Reliability of the PPG Used in Respondent's Case

The first psychologist to evaluate appellant for commitment into the SVP program was Dr. Marie Gehle. R. 434, l. 24 – 439, l. 9. Dr. Gehle has been the chief psychologist at the Department of Mental Health for ten years. R. 434, l. 24 – 439, l. 9. Since 2012, she has performed pre-commitment SVP evaluations full-time. R. 434, l. 24 – 439, l. 9. Dr. Gehle determined that appellant did not meet the criteria for commitment. R. 459, l. 2 – 18.

The State sought a second opinion from Dr. Emily Gottfried at MUSC in Charleston. R. 248, l. 6 – 254, l. 4. She opined that appellant was a sexually violent predator. R. 373, l. 19 – 375, l. 24. The State pays MUSC per case, but Dr. Gottfried said she earns a salary that is not contingent on the results of her evaluation. R. 251, l. 15 – 252, l. 3.

Both experts agreed that appellant has antisocial personality disorder. R. 371, l. 3 – 9. Dr. Gottfried opined that appellant also has paraphilic coercive disorder, which means he is sexually aroused by non-consensual sex. R. 368, l. 21 – 369, l. 3. Dr. Gottfried's opinion about appellant's coercive disorder was based largely on inadmissible results of a penile plethysmograph ("PPG") test. R. 334, l. 1 – 20.

Both parties filed written motions regarding the admissibility of the PPG. R. 541. The trial court conducted an extensive pretrial hearing regarding the reliability of the PPG test administered by Dr. Gottfried. R. 94, l. 16 – 206, l. 3. Judge Jefferson made a preliminary ruling that the PPG would be admitted, but stated she would need to hear a proffer again during the trial. R. 212, l. 24 – 220, l. 3. After hearing the proffer, the court stood by its preliminary ruling and allowed the PPG into evidence. R. 338, l. 11 – 15.

Dr. Gottfried explained at the pretrial hearing how a PPG works:

So a PPG works by an examinee sits in a private room by themselves. They are covered up and they put a strain gauge, that can either be done with mercury or

indium/gallium, on their penis. They put it mid shaft to the base, in that area. They then sit in a comfortable chair. They listen to audio or verbal scenarios describing sexual situations with children, teenagers and adults and they compare those responses to that individual's arousal or millimeters of change of the circumference of the penis for consenting adults and stimuli.

R. 102, l. 1 – 10. Appellant underwent two PPG exams totaling approximately thirteen hours in the “comfortable chair” with a strain gauge around his penis. R. 117, l. 11 – 24.

Appellant’s motion to exclude the PPG testing focused on the unreliability of the stimulus set used by Dr. Gottfried. R. 541. The stimulus set used was called “Real Child Voices.” R. 101, l. 20 – 24. Dr. Gottfried said that between “40 to 85 labs” out of 126 labs using the hardware from this case use the Real Child Voices stimulus sets. R. 104, l. 9 – 18.

Dr. Gottfried opined that the PPG—in general—is reliable and was the subject of at least 100 articles. R. 108, l. 1 – 8. However, she 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. 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.

Appellant called Dr. Gehle as a witness concerning the PPG at the pretrial hearing and she testified that she had never used a PPG in ten years of doing precommitment evaluations for the Department of Mental Health. R. 90, l. 6 – 8. DMH has a PPG machine available, but Dr. Gehle does not use it because of her concerns about its reliability and validity of the results. R. 89, l. 25 – 90, l. 11.

Dr. Gehle explained “there is a lack of research supporting the reliability and validity of the stimulus sets.” R. 77, l. 23 – 78, l. 4. She also testified that the tests lack standardization, were subjective, and there were differences in how the tests are administered and interpreted. R. 77, l. 23 – 78, l. 4. She was familiar with the Real Child Voices stimulus set and knew its creator, Dr. Burke from Summerville. R. 78, l. 18 – 80, l. 11. Regarding the Real Child Voices set, Dr. Gehle testified, “There has been no research studies published in peer reviewed articles.” R. 80, l. 12 – 15. Until such research was done, Dr. Gehle said “we don’t know if what he says he’s measuring he’s actually measuring.” R. 80, l. 16 – 25. She cited the work of an early developer of the PPG, William Marshall, who no longer recommends use of the PPG because of the lack of standardization. R. 81, l. 19 – 82, l. 13. Because of the lack of standardization, particularly among stimulus sets, if a person was sent to two different labs they could get different results. R. 84, l. 2 – 20.

During the trial, 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. Judge Jefferson found Dr. Gottfried more credible than Dr. Gehle regarding the PPG, ruled that it was reliable, and allowed the State to introduce it into evidence.¹ R. 213, l. 17 –

¹ The trial court’s basis for finding Dr. Gottfried more credible than Dr. Gehle was Dr. Gottfried’s greater experience using the PPG and Dr. Gehle’s lack of “first-hand experience.” R. 218, l. 20 – 220, l. 3. This finding is problematic and illogical. It discredits Dr. Gehle because she refuses to use a test she considers unreliable. This type of reasoning would find a

220, l. 3. R. 338, l. 11 – 15. Dr. Gottfried told the jury that appellant had “clinically significant arousal” to eight scenarios featuring coercion or sexual violence. R. 353, l. 11 – 13.

The trial court erred in finding appellant’s PPG results admissible because the Real Child Voices stimulus set is unreliable. When determining the admissibility of scientific evidence after its reliability has been challenged, a trial court should consider (1) the publications and peer review of the technique, (2) prior application of the method to the type of evidence involved in the case, (3) the quality control procedures, and (4) the consistency of the method with recognized scientific laws and procedures. 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 here failed this test for reliability.

The State’s lawyer admitted the Real Child Voices stimulus set had never been subjected to peer review, which agreed with Dr. Gehle’s testimony. Dr. Gottfried could not cite any peer reviewed publication that specifically tested the accuracy of the Real Child Voices set for paraphilic coercive disorder. Except for MUSC’s own use, which had not been published, there was no data on the prior application of the Real Child Voices set to the type of evidence presented in this case.

While the trial court credited Dr. Gottfried’s testimony about the quality control procedures, these procedures were designed to prevent persons from cheating on the test. The quality control here did not apply to Dr. Gehle’s central concern—whether the subjects are aroused to what the stimulus set claims is the focus of the arousal. This central concern about the stimulus set is captured by the fourth factor which is whether the stimulus set is consistent with recognized scientific laws and procedures. As Dr. Gehle explained, human arousal is so

phrenologist more credible than a neurologist because a neurologist does not feel a patient’s head for bumps.

poorly understood that saying a person is aroused to coercion in a particular stimulus set is too difficult. The arousal could be the result of a huge number of variables in any particular stimulus set, which Dr. Gottfried agreed that each part was “like a little play.” R. 351, l. 9 – 10. The State failed to meet its burden as the proponent of the Real Child Voices stimulus set and the trial court erred in admitting it under its gatekeeping role. See State v. Phillips, 430 S.C. 319, 334-35, 844 S.E.2d 651, 659 (2020).

“Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible.” State v. Pressley, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986). While Dr. Gottfried took great pains to try to distinguish a PPG from a polygraph, a PPG is simply a more specific type of polygraph. R. 114, l. 16 – 115, l. 16. Like a polygraph, it measures fluctuations in a person’s body in an attempt to read their mind. The PPG uses “countermeasures” as described by Dr. Gottfried that are like those of a polygraph—measuring respiration and a pad that measures movement on a seat. Tellingly, when trying to describe what must be a control group for the PPG (if such a thing could exist), she talked about using the polygraph on “super normals” to verify the results of a PPG, describing it as “the best way to do it.” R. 333, l. 13 – 22. If the reliability of the PPG must be verified by a polygraph—which has already been held to be unreliable and inadmissible—then a PPG cannot also be admissible as human arousal is a far more complicated thing to attempt to measure and understand than deception. If this Court chooses to give the State *carte blanche* to admit PPG tests, it will have to reconsider at some point its precedents banning admissibility of polygraph testing.

As Dr. 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 the stimulus set and did not issue any grand ruling 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.

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).

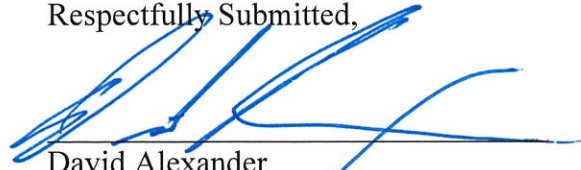
The Real Child Voices stimulus set for the PPG used in this case lacked reliability and the court erred in admitting it. The error was highly prejudicial because of the risk noted by the

Billups court that laymen, especially jurors, would gravitate toward uncritical acceptance of the PPG when confronted with such a foreign and unusual trial like an SVP case. Dr. Gottfried urged the jury in this direction, telling them that the PPG was “an objective way” to measure arousal. R. 348, l. 16 – 349, l. 1. Referring to the PPG, the State told the jury in closing argument, “So he might say one thing, but his body can’t lie.” R. 504, l. 13 – 505, l. 2. The PPG was one of the main bases for her diagnosis of paraphilic coercive disorder. The admission of this highly prejudicial evidence warrants reversal.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed and respondent's commitment reversed.

Respectfully Submitted,



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This 14th day of August, 2023.