

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Kershaw County  
The Honorable Daniel McLeod Coble, Circuit Court Judge  
Appellate Case No. 2023-001950

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In the Matter of the Care and Treatment of  
Jeremiah James Pough,

Appellant.

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**RESPONDENT’S REPLY TO  
RETURN TO MOTION TO REMAND**

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The State, by and through the undersigned, hereby submits this Reply to Appellant’s Return to Motion to Remand:

1. Review of the procedural history of this matter is necessary due to certain claims Appellant’s counsel makes implying nefarious actions by the State in raising the issue currently before this Court. The most outrageous of those claims is the assertion that the State raised the issue “more than a year since the trial court’s ruling and after both final judgment and the service of the notice of appeal.” (Return, p. 2). Counsel has the trial transcript as evidenced by his citation to it in the paragraph immediately preceding the quoted assertion, and a mere cursory review of the transcript reveals the trial in this case began on Monday, November 13, 2023, and concluded with a jury verdict on Thursday, November 16, 2023.<sup>1</sup>

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<sup>1</sup>The quoted language “more than a year” makes it clear the assertion was not merely a misstatement based on confusion between 2022 and 2023.

A Council hearing regarding admissibility of penile plethysmography (PPG) evidence took place on Monday (November 13) after jury qualification and selection, and the expert's testimony took the remainder of the day.<sup>2</sup> Judge Coble issued his oral ruling on Tuesday (11/14) morning and gave initial instructions to the jury, the parties gave opening statements and then the State's expert testified for the remainder of the day. Appellant's expert testified all day Wednesday (11/15), closing arguments and jury instructions took place on Thursday (11/16) morning, and the jury verdict was rendered that day. In short, in the course of a four day trial, there was little "opportunity" between jury selection on Monday and the jury verdict on Thursday to prepare, review and submit the written order Judge Coble requested be submitted "at some point" after his oral ruling. See Exhibit A (11/14/23 Limited Transcript, pp. 4-11).

Given the complexity of the intervening trial proceedings, the State sought a transcript of Judge Coble's November 14 oral ruling in order to correctly set forth his findings and conclusions. Due to the Thanksgiving holiday and other circuit court proceedings, including a week-long trial in another sexual predator case, the State was unable to complete and submit the proposed order before trial counsel filed the notice of appeal on December 15, 2023. By letter dated December 28, 2023, this Court advised trial counsel of the need for proof that the notice of appeal had been served on the Kershaw County Clerk of Court as required by the Appellate Court Rules. On January 10, 2024, trial counsel provided this Court with documentation reflecting the notice of appeal was filed with the Kershaw County Clerk of Court on December 21, 2023. Prior to receipt of the January 10, 2024, documentation from this Court, the State did not know the Kershaw County Clerk of Court had been served with the notice. Thereafter, by letter dated January 25, 2024, this Court advised counsel that the time to order the transcript had expired.

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<sup>2</sup>Of note, Appellant did not move to exclude the PPG evidence prior to the day of trial.

The Chief Appellate Defender was copied on all correspondence from this Court, including the December 28 deficiency letter and the January 25 transcript letter. The Division of Appellate Defense ordered the trial transcript on January 29, 2024, and filed the transcript request with this Court on that date.

After receiving and reviewing the transcript of Judge Coble's oral ruling, and working on a draft of the proposed written order, the State realized that when instructing the State to prepare the written proposed order "at some point," Judge Coble stated the order "doesn't have to be just essentially what I said, what the prior motion, kind of summed up again, **what was testified to.**" (Exhibit A, p. 11) (emphasis added). In order to accurately set forth the testimony summarized by Judge Coble, the State then requested the November 13 Council hearing transcript.

After realizing the hearing testimony transcript was necessary to comply with Judge Coble's instructions, the State sent this Court a letter on January 30, 2024, regarding the written order and asked that the appeal be held in abeyance pending issuance of Judge Coble's written order. The State received the hearing transcript on February 6, 2024, and continued working on the proposed order pending directions from this Court.

By letter dated February 8, 2024, this Court advised the State it was construing the January 30 letter as a motion to remand and requesting opposing counsel "to file a return no later than ten (10) days from the date of this letter." The Chief Appellate Defender (not trial counsel) was copied on that correspondence. Pursuant to that letter, the return was due no later than February 19, 2024. No return was filed and no extension was requested by that date.

On February 21, 2024, the Division of Appellate Defense advised this Court it had received the trial transcript.<sup>3</sup> Thereafter, by letter dated February 26, 2024, this Court again advised the State it was construing the January 30 letter as a motion to remand, and specifically asking Appellate Defense “to file a return no later than ten (10) days from the date of this letter.” The Return was filed nine (9) days later on March 7, 2024, which was thirty-seven (37) days after the State raised the issue regarding Judge Coble’s written order. As noted above, the Chief Appellate Defender was copied on all correspondence involving this appeal.

2. The timeline of events reveals the State did not unduly delay or act nefariously in seeking to comply with Judge Coble’s express instructions. The “context” of the State’s January 30 letter was the express instruction from Judge Coble, which Appellant’s counsel does not dispute. Further, counsel’s assumption the proposed order is “unprepared” and his reference to the proposed order as “nonexistent” are inaccurate. Drafting of the order started after the trial, continued after the State received the oral ruling transcript and has continued since the State received the hearing transcript until current date.

3. The expert PPG testimony at issue in the Council hearing was admitted during trial, but because Judge Coble expressly stated his intent to issue a written order setting out his ruling on the admissibility of the evidence, the jury verdict did not constitute a final judgment in the case. Judge Coble did not lose jurisdiction to issue a written order reflecting his oral ruling and specifically referencing the testimony from the hearing. Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. Ford v. State Ethics Comm’n, 344 S.C. 642, 545 S.E.2d 821, 823 (2001).

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<sup>3</sup>Appellate Defense was able to receive the transcript so quickly (less than 30 days after the request) because the State had already obtained and paid for portions of it.

The parties in this case were on notice that a written order was forthcoming, and preparation of the written order after the trial concluded was hindered by the need to obtain the relevant transcripts for accuracy purposes. Appellant's argument that a notice of appeal precludes issuance of a written order expressly required by the presiding judge means that the losing party can file a notice of appeal specifically to prevent issuance of an adverse written order.

4. Appellant's counsel implies that the State is improperly attempting to "clean up an issue surrounding its failure to produce a written order," "re-open the record below and supply the lower court with a written order on an interlocutory issue," and "improperly open and supplement the record after final judgment." Again, the State has been very transparent about the basis for its request that the appeal, which the State submits is premature in the absence of Judge Coble's written order, be held in abeyance. Any proposed order will be based on the testimony at the Council hearing (as documented in the hearing transcript) and Judge Coble's oral ruling (as documented in the November 14 transcript), and the State is not attempting to "add material that was not presented to the trial court in connection to a critical ruling that would needlessly complicate the issues before this Court," or "deviate from the language" of Judge Coble's ruling.<sup>4</sup> Judge Coble, trial counsel (and appellate counsel if he so chooses) will be able to review the proposed order and relevant transcripts to ensure the contents accurately reflect Judge Coble's ruling and the basis for it.

5. There are several indisputable facts in this matter. First, a full Council hearing on the PPG took place on November 13, 2023. Second, Judge Coble issued an oral ruling on November 14, 2023, finding the PPG evidence was admissible and outlining the basis for his ruling, and then

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<sup>4</sup>Counsel's assertion that a written order would be "interlocutory" is unavailing. Judge Coble's written order would not be interlocutory at this point, it would constitute a final judgment, and its contents could be challenged on appeal.

expressly instructed that a written order be prepared for his signature. Third, the jury verdict was rendered on November 16. Fourth, Judge Coble did not rescind his instructions regarding issuance of a written order. Fifth, the notice of appeal filed on December 15 did not include the required proof of service on the Kershaw County Clerk of Court, which was not filed with this Court until January 10, 2024. Sixth, the Chief Appellate Defender was copied on all correspondence related to this matter, including the State’s January 30 letter, and the Division of Appellate Defense did not raise any objection to the issue until March 7.

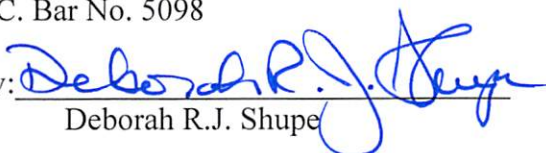
6. All the State is requesting is that Judge Coble to be able to issue the written order in accordance with his expressly stated intent to do so. Appellant calls the PPG ruling a “critical” ruling that will “likely” be a “significant issue” on appeal. Judge Coble may well have understood the issue may be raised on appeal if the jury found Appellant is a sexually violent predator, and he wanted to ensure his ruling, and the basis for it, was clear. Judge Coble should be afforded the opportunity to memorialize his ruling regarding admissibility of the PPG evidence in a written order as he envisioned.

Accordingly, the State requests that Judge Coble be given that opportunity by either holding the filed appeal in abeyance or remanding the case to Judge Coble for a written order.

Respectfully submitted,

ALAN WILSON  
Attorney General

DEBORAH R.J. SHUPE  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 5098

By:   
Deborah R.J. Shupe

ATTORNEYS FOR RESPONDENT

# **EXHIBIT A**



1           THE COURT: All right. As to the -- back on the record  
2 for -- in the matter of the care and treatment of Jeremiah  
3 James Pough. We ended yesterday's hearing with the Daubert  
4 counsel hearing. With the testimony of Dr. Godfrey regarding  
5 the PPG, specifically about her treatment of Mr. Pough and  
6 her determination about the sexual violent predator nature of  
7 that and the future risk.

8           Mr. Kirkland made the argument that it was not reliable  
9 based on many factors. In my procedure for determining  
10 whether or not to admit it under the reliability standard,  
11 first and foremost, just making some findings of fact and law  
12 as I see it under 702. The three factors I first need to  
13 determine, first, is this type of evidence beyond the scope  
14 of the ordinary juror. I think we all agree that it is, it's  
15 highly technical.

16           It was explaining both psychiatry, psychology, as well  
17 as physiology of a human and how a scientist interpreted that  
18 data. So I think an expert -- expert is needed. It'll be  
19 helpful to the juror. So -- so I find that first factor is  
20 met.

21           Secondly, when it comes to the qualifications, I  
22 believe that Dr. Godfrey is qualified based on her skills,  
23 requisite knowledge, her training, her experience. She was  
24 qualified in as an expert in several different areas for the  
25 purposes of Daubert counsel hearing, the sexual evaluation

1 and specifically with the PPG. She did -- she went through  
2 her entire training which was significant, including being  
3 the director of the behavioral sciences department, as well  
4 as a lot of other training, and writing, presentations, all  
5 in this specific field for well over the past decade, if not  
6 more, so I find she was qualified in this area.

7         The third factor, which needs to be determined is is  
8 the underlying science reliable. Obviously, whether it's  
9 reliable does not, I mean, whether or not it's credible. I  
10 need to find whether or not it is reliable, though that  
11 threshold foundational question before it goes to the jury as  
12 the gatekeeper.

13         First, I find that this is scientific in nature. I  
14 don't -- I don't believe it's not scientific. I believe it's  
15 scientific in nature. So the counsel factors are the ones  
16 that I'm looking for.

17         Several of these factors. Now, whether or not I need  
18 to use every single one, whether I need to go outside of  
19 them, which is different under Daubert. I don't know what  
20 our Supreme Court has said it all. It kind of changes, but  
21 the way I looked at this -- this science, kind of the  
22 general, then more specific and then more specific than that.

23         First and foremost, the actual machine from limestone,  
24 we heard testimony that it was created back in the 1950s.  
25 The general technology for different reasons it was created.

1 So it's been around for a long time. It's been used not just  
2 for the sex evaluation, but it was also used -- we saw from  
3 two different exhibits; we saw from Court's Exhibit 1 that  
4 under Blue Cross Blue Shield it generally has been used for  
5 heart failure, and other -- other measuring types of devices  
6 to show that it's accurate in what it's doing in its physical  
7 form.

8 And as -- as Dr. Godfrey explained the procedure about  
9 how it works and what it measures. So I think the actual  
10 machine, based on the testimony and the evidence presented,  
11 that is reliable, that it -- it measures what it measures.

12 Now, the second step is combining the physical and  
13 physiological aspect of this machine with the psychological,  
14 with the -- the thoughts and the connection from the brain to  
15 the blood flow, and how that is measured.

16 So the next thing I look at are, there were a lot of  
17 peer review articles presented, which I believe was Court's  
18 Exhibit Number 3, which the doctor testified to that she had  
19 reviewed, looked at, studied before.

20 A lot of these peer review articles go through PPG, and  
21 sexual behavior assessment based on different types of  
22 situations. Adult victims, child victims, violence, other  
23 things these articles discussed about how the PPG works and  
24 its connection with the sex evaluation, whether it be  
25 pre-commitment treatment or whatnot. The general science

1 seems to be sound that you can study the PPG and its relation  
2 with sexual evaluation and the physical, physiological  
3 changes that the machine records.

4         So I think that's important to -- to understand the  
5 baseline that I believe that the physical machine works based  
6 on science. And it is reliable that the -- the science of  
7 studying sex evaluation, the psychological connection between  
8 the thoughts of a potential offender or a patient and the  
9 machine are based on peer-reviewed articles. That it is  
10 reliable, that it has been tested, that has been studied for  
11 many years through many different peer-reviewed articles.

12         As to the specific science that was used by Dr. Godfrey  
13 with, we have the limestone machine and then we have the  
14 specific trial sets, which included the Marshall and the RCV,  
15 I believe it was. And how these stimuli worked in her  
16 assessment, and how they were connected.

17         For me, the most important thing was that this was one  
18 data point among many that she used in making her assessment.  
19 She stated, I believe multiple times that it would not work  
20 solely based on as one data point, because it's not reliable  
21 enough. She needs to use her expert training and experience  
22 and other knowledge of this area of the medical field to  
23 determine, to make her evaluation about whether or not  
24 someone is likely to re-offend under that standard.

25         So she used the -- the peer-review technique. She

1 cited several articles, which again was in Court's Exhibit 3.  
2 She has discussed her many peer-reviewed articles. She's  
3 written peer-reviewed presentations, she has given, as well  
4 as other discussions she has had on this subject multiple  
5 times before.

6 We discussed -- throughout her testimony, she discussed  
7 the application method -- kind of prior application  
8 throughout not just the State, but the United States and  
9 throughout the world. There was an issue about it not being  
10 standardized, which I understand.

11 However, the underlying science, which I asked her  
12 about was the stimuli which was being used, which is used in  
13 different places, which she manipulates scientifically per  
14 patient. I believe is standardized in how the underlying  
15 science was created.

16 The Marshall test, she discussed how that was created.  
17 The RCV, she discussed how that was created, and why it's  
18 important that these voices were used in certain ways. And  
19 so the underlying science of whether or not it was the same  
20 Marshall test, or the same RCV test, or she changed a  
21 question here or there, was based on the studies and getting  
22 the -- the sexual type of arousal out of the patient. So  
23 there was a basis on how they did that.

24 She talked about the quality control procedures  
25 extensively, including Court's Exhibit 4, which is the

1 procedure for the instructions to ensure that -- that it's  
2 done properly. That is -- there's controlled measure  
3 including the -- the seating that the patient was used to  
4 ensure that they can't manipulate it. Even though this was  
5 her own checklist that she created, it shows that there is a  
6 quality control procedure used in this method.

7 She also discussed the -- the cut score, and how she  
8 evaluates that. And that goes, I think, the consistency of  
9 the -- method with recognized scientific laws and procedures  
10 that she changed the cut method based on her own evaluation.  
11 And why -- she discussed why she used a certain more  
12 conservative cut method, as opposed to a treatment method,  
13 you might make a little bit less because you're -- it's  
14 different. She discuss it's different for treatment versus  
15 essentially diagnosis or an assessment. And that went to the  
16 specificity and sensitivity.

17 She discussed the false positives versus false  
18 negatives and how she used her -- the method changed based  
19 on that, and how they were more concerned about avoiding  
20 false positives, and they'd rather have false negatives so  
21 that it can be consistent.

22 I believe that essentially covers it. There were these  
23 other court exhibits, Court Exhibit 5, which is the sexual --  
24 sexually violent predator, is a clinic science handbook.  
25 Court Exhibit 6, goes to some peer-reviewed studies of

1 limestone and that machine.

2           We have the DSM-5-TR, Court Exhibit 8. The diagnostic  
3 markers which quote, "The most thoroughly researched and  
4 longest use of such measures is the PPG, although the  
5 sensitivity and specificity of diagnosis may vary across  
6 sites, which frequently use different stimuli procedures and  
7 scoring."

8           And again, I think this goes to the overall technology  
9 is sound and reliable based on the peer-review studies, based  
10 on the link that's been used. And then as the DSM talks  
11 about, it varies site by site. And then Dr. Godfrey  
12 explained why it varies, and how she uses it in different  
13 ways, which I believe are based on scientific methods.

14           So I find that the underlying science is reliable for  
15 purposes of 702. Obviously, the credibility can be attacked,  
16 but I think that has met that threshold matter. As to 403,  
17 I believe the -- the probative value versus prejudicial,  
18 obviously, the probative has to be substantially outweighed  
19 by the prejudicial effect. And this is extremely probative  
20 because it goes to the underlying element of the two  
21 elements, you know, did he have a conviction and then what  
22 was her assessment.

23           So I believe that the 403 -- it also passes 403 with  
24 the burden being on the State for all of those factors, I  
25 believe they have carried that burden. So I find that it is

1 reliable, and I'll allow her to testify to it.

2 Anything else from the State?

3 MR. RUNYAN: No, Your Honor. Thank you.

4 THE COURT: Okay. And if the State -- if the State  
5 will prepare a written proposed order for the Respondent to  
6 review at some point. It doesn't have to be just essentially  
7 what I said, what the prior motion, kind of summed up again,  
8 what was testified to. So I believe that was rather  
9 accurate. So if you will have that and let Defense counsel  
10 review that as well.

11 MR. RUNYAN: Okay.

12 THE COURT: And anything else from the Respondent?

13 MR. KIRKLAND: No, sir. I believe I don't need to make  
14 further objection that it's already preserved since we -- I  
15 filed a motion and you made a ruling, so I would redo the  
16 motion just ---

17 THE COURT: Of course.

18 MR. KIRKLAND: -- just make sure (crosstalk).

19 THE COURT: Of course. It is renewed -- your  
20 objections are renewed for the record.

21 MR. KIRKLAND: Thank you.

22 THE COURT: All right. Anything else? We can bring  
23 the jury in?

24 MR. RUNYAN: No, Your Honor. We're ready.

25 MR. KIRKLAND: No, Your Honor.

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Mar 19 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Kershaw County  
The Honorable Daniel McLeod Coble, Circuit Court Judge  
Appellate Case No. 2023-001950

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In the Matter of the Care and Treatment of  
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**PROOF OF SERVICE**

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I, Sally B. Ellison, certify I served the State's Reply to the Return to Motion to Remand by email to the address reflected in the AIS system to:

Gary H. Johnson  
Assistant Appellate Defender  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Columbia, SC  
[ghjohnson@sccid.sc.gov](mailto:ghjohnson@sccid.sc.gov)

I further certify that all parties required by Rule to be served have been served.

This 19th day of March, 2024.

  
\_\_\_\_\_  
SALLY B. ELLISON  
Legal Assistant

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