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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2022-000371

IN THE MATTER OF THE CARE AND TREATMENT
OF SHAWN TORLIF DAILY,

APPELLANT

RESPONDENT'S PETITION FOR REHEARING

On June 12, 2024, the court reversed Appellant's civil commitment pursuant to the South Carolina Sexually Violent Predator Act (SVPA), finding error in the admission of evidence regarding the results of a penile plethysmograph (PPG) conducted in the course of Appellant's evaluation, and the error was not harmless. In re Shawn Torlif Daily, Op. No. 6061 (S.C. Ct. App. filed June 12, 2024). Pursuant to Rule 221(a), SCACR, Respondent respectfully requests that the court rehear the matter, and consider the significant points overlooked and/or misapprehended by the court as discussed below.

Rehearing is appropriate and necessary in this case because the court failed to apply the appropriate standard of review, overlooked evidence in the record, and misapprehended the law related to admissibility of expert opinions. In particular, the court's apparent *de novo* determination regarding reliability and admissibility of the PPG evidence failed to recognize, analyze, or give due deference to the findings and legal conclusions of the Honorable R. Keith Kelly regarding the

reliability of PPG testing, which he made after a full pre-trial evidentiary hearing consistent with State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), and State v. Council, 335 S.C. 1,515 S.E.2d 508 (1999) (hereinafter Jones/Council). In reversing Judge Kelly's ruling that the PPG was reliable, the court ignored significant, undisputed evidence regarding the PPG's reliability and its admissibility as a factor considered by the State's expert in formulating her opinion that Appellant meets the criteria for commitment as a sexually violent predator under South Carolina law.[1]

In addition, even assuming error, the court's harmless error analysis was fundamentally flawed. The court again focused on very limited testimony regarding the PPG evidence without considering that evidence in context and in relation to the entirety of the evidence as required by well-established South Carolina case law.

ARGUMENT

A. The court failed to apply the required and appropriate standard of review.

The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing the trial court's rulings were based on an error of law or were unsupported by evidence in the record. State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020); State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009); *see also* State v. Davis-Kocsis, Op. No. 28213, 2024 WL 3169855 at *3, n. 2 (S.C. Sup. Ct. filed June 26, 2024) (appellate court's standard of review regarding evidentiary rulings is "simply to determine whether the trial court acted within its discretion," and "[i]f so, we affirm"). The exercise of discretion means "the trial court—when

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[1]The court decided this case without oral argument, during which evidence regarding the PPG's general reliability and acceptance could have been discussed, and the State would have been afforded an opportunity to address the court's concerns.

ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it." State v. Wallace, 440 S.C. 537, 892 S.E.2d 310, 312–13 (2023) (*citing* Morris v. BB&T Corp., 438 S.C. 582, 885 S.E.2d 394, 397 [2023]).

> The trial court's recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process; and when a trial court's thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court's exercise of discretion, even when the judges on the appellate court might have made the decision differently.

Morris at 397. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it may be offered into evidence, and vigorous cross examination, presentation of contrary evidence and careful instructions on the burden of proof are the traditional appropriate means of attacking admissible evidence. In re Matter of Ridley, 433 S.C. 316, 858 S.E.2d 165, 168-169 (Ct. App. 2021).

Even though the court cited the appropriate abuse of discretion standard of review, it reversed Judge Kelly's conclusions with **no analysis** of the evidence before him, much less his detailed findings on each Jones/Council factor with references to the specific evidence on which he relied.[2] The court did not find any of Judge Kelly's findings and conclusions lacked evidentiary support and cited no error of law, but in a conclusory fashion, overlooked the extensive evidence before Judge Kelly regarding the reliability of the PPG, particularly in relation to the Jones/Council factors.

[2]Indeed, it is difficult to find anything in the court's opinion indicating the court even read, much less considered, Judge Kelly's analysis, findings and conclusions.

It is clear from the record that Judge Kelly recognized his responsibility to exercise his discretion regarding admissibility of PPG evidence, and he meaningfully engaged in exactly the deliberative process described in Wallace and Morris.[3] Rather than fully analyze the evidence and Judge Kelly's findings, the court focused on one statement regarding standardization in Dr. Gottfried's in-depth pre-trial testimony, which it took out of context and only quoted in part. In essence, instead of applying the appropriate abuse of discretion standard of review, the court engaged in a *de novo* review and substituted its judgment for Judge Kelly's without finding abuse of discretion as to any of Judge Kelly's findings or conclusions. An appellate court's distaste for a particular scientific test or evidence is not a basis for overruling a trial court's comprehensive and well-reasoned analysis and ruling regarding the evidence's admissibility. *See* Morris; Wallace; State v. Phillips, 430 S.C. 319, 844 S.E.2d 651, 662 (2020) (appellate courts analyze the admissibility of scientific evidence for the first time when the trial court fails to meaningfully exercise its discretion).

During the pre-trial hearing, Dr. Gottfried was qualified (by stipulation) as an expert in forensic psychology as well as the field of penile plethysmography. Her PPG testimony was virtually undisputed, but the court dismissively summarized Dr. Gottfried's pre-trial testimony while ignoring the context or full content of her testimony.

Significantly, the court stated Dr. Gottfried had "'about 36 peer-reviewed publications or book chapters in peer-reviewed scholarly books'" regarding the PPG. While the quoted language is accurate, the court took it out of context, ignoring another important part of Dr. Gottfried's testimony. She testified the PPG has been the subject of "**over a hundred**" peer reviewed studies

[3]The evidence before Judge Kelly and his detailed ruling regarding admissibility of PPG evidence are set forth in detail at pages 3-9 of the Brief of Respondent with citations to the record, and are incorporated herein by reference.

and publications in the general sexual health and sexual offending literature, and there had been "**over sixty**" professional conference presentations regarding the PPG.[4] (R., pp. 19-20) (emphasis added). By ignoring the substance of this testimony, the court avoided evaluating the PPG on its documented merits.

The court refers to Dr. Gottfried's testimony regarding "a diagnostic manual" and "a clinical science handbook." These references downplay and dismiss the undisputed fact that the Diagnostic and Statistical Manual, Fifth Edition (DSM-5) is widely acknowledged as the leading authority on mental health diagnoses, and the "Sexually Violent Predators: A Clinial Science Handbook" is written by recognized experts in the field of assessing people for civil commitment as sexually violent predators. Both recognize the PPG is used as a physiological measure of sexual arousal. (R., pp. 32-36).

The court noted Dr. Gottfried "opined that SVP programs in Minnesota, California, Illinois, New York and possibly Missouri use the [Real Child Voices] methodology for treatment programs." Then, by way of footnote, the court stated Dr. Gottfried "mentioned" those jurisdictions used the PPG "for precommitment," but her reference to "programs" only meant the treatment programs. While Dr. Gottfried did subsequently clarify that her reference to "programs" was to SVP treatment programs in those jurisdictions, she definitively stated that evaluators in the states also used the PPG for precommitment evaluations and annual reviews. (R., pp. 42, 64-65). In short, it was undisputed that the PPG is used in those jurisdictions for evaluations as well as treatment.

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[4]Her reference to "36 peer-reviewed publications or book chapters" was to her personal publications, of which four or five related to the PPG, and she had personally presented about the PPG at ten to twelve conferences.

The court further stated (and then emphasized) that Dr. Gottfried "admitted the PPG had standardization issues," but ignored the context of her testimony regarding standardization. Specifically, Dr. Gottfried testified:

> [S]tandardization is an issue, and really what's driving that is that other countries can do things that other countries can't do. So, for example, my colleagues in Canada have been administering PPGs for at least 30 years, and they have been using the same stimuli for a very long time. That stimuli includes nude children, which we cannot use here in the U.S.
>
> And so, when I'm working with this <u>international</u> standardization group that I'm a part of, there's a lot of discussion about them having to change things that they've been using for a long time that works for them just because now, when we're trying to <u>internationally</u> standardize it, they don't want to change their methods, because this is what works for them; they're allowed to use it. So I'd say that's probably the biggest criticism.

(R., pp. 28, 36-37) (emphasis added). Thus, rather than generally stating there are standardization issues with the PPG, Dr. Gottfried clearly indicated the standardization criticism arises primarily from <u>international</u> differences between what labs in some countries can use as stimuli that labs in other countries cannot use.

In addition, the court stated Dr. Gottfried "admitted" the PPG "did not always have expected results." Again, the court ignored the context and full extent of Dr. Gottfried's testimony on that issue. She testified:

> Another [criticism] is that it's been noted that the PPG doesn't always have expected results. And so, for example, it's been noted that somebody who had offenses against children, they don't always show arousal while undergoing a PPG to children. And to me, I don't understand that argument for a couple of different reasons, but the main one is, is that we know that people offend against children for numerous reasons. Arousal to children is only one of them. There are people who sexual (sic) offend against children who are not sexually aroused by children, and so you would expect that those people wouldn't be aroused to children on the PPG.

(R., p. 37). On cross-examination, Dr. Gottfried reiterated "there's been some commentary or criticism in the literature" that men who have offended against children do not always show sexual

arousal to children on the PPG, but she again testified that having a paraphilic interest in children is only one reason people sexually offend against children, and if they offend for a non-paraphilic reason, they would not be expected to show paraphilic arousal on the PPG. (R., p. 63). In other words, Dr. Gottfried did not "admit" the PPG has unexpected results. To the contrary, she indicated such criticism was not well founded.

The court also truncated Dr. Gottfried's PPG testimony before the jury, again reducing it to criticism regarding PPG standardization and expected results. As it did with the pre-trial testimony, the court ignored the context and full content of Dr. Gottfried's testimony on those issues.

During her trial testimony explaining what the PPG is and how it works, similar to her pre-trial testimony, Dr. Gottfried testified there were international standardization issues, and explained why standardization between different countries is problematic. (R., pp. 228-229). As to the expected results issue, Dr. Gottfried stated some of "the literature" referenced unexpected PPG results related to people who sexually offend against children and do not show arousal to child stimuli during the PPG, but "[t]here have been a lot of studies looking at the reliability of the PPG and its ability to differentiate between people who offended against children and people who haven't," and the big studies "really showed that the PPG has the greatest validity and reliability" "for people who are aroused by children." (R., p. 229-233).

Dr. Gottfried did state Appellant's PPG results "were right in line with his offenses," and his clinically significant arousal to trials featuring sexual activities with prepubescent females was "really consistent with his offense behaviors."[5] Significantly, however, she also testified about

[5]Appellant actually conceded the PPG results were "expected" because he has pedophilia (discussed below).

Appellant's responses when she discussed the results with him, including that he "was disheartened" about them and said he did not feel aroused during the scenarios but was "tense" and "mad at the aggressor." (R., pp. 233-235). That was the extent of her direct testimony about Appellant's PPG test.

The court recognized "there may be contrary authority finding the PPG is reliable and probative." (emphasis added). The case law from Washington and Illinois that the court cited definitively held, after extensive analysis, that the PPG **is** reliable and probative. Rather than consider the analysis in those cases, however, the court relied on dicta from In re Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), stating the PPG is "controversial and has been criticized for a lack of standardization and for being subject to manipulation," and courts have "uniformly" found PPG tests results are inadmissible due to a lack of accepted standards for the test in the scientific community. The court then cited outdated case law and articles as support, while ignoring the extensive and more recent research, publications and presentations cited and discussed in Respondent's Brief, none of which were refuted by Appellant.

The court failed to apply the required abuse of discretion standard of review, ignored substantial evidence in the record, and substituted its judgment for Judge Kelly's well-reasoned ruling. Accordingly, the court should rehear this matter and affirm Judge Kelly's appropriate and meaningful exercise of his discretion.

B. The court's harmless error analysis overlooked other overwhelming evidence that supported the jury's verdict and mischaracterized Dr. Gottfried's testimony before the jury.

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893, 897 (2003). "A harmless error analysis is contextual and specific to the circumstances of the case," and "the materiality and prejudicial character of the

error must be determined from its relationship to the entire case." State v. Heller, 399 S.C. 157, 731 S.E.2d 312, 320 (Ct. App. 2012) (emphasis added).[6] "It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611, 613 (1983).

As with its PPG analysis, the court set forth the correct harmless error standard, but then failed to apply it. Rather than considering the PPG trial testimony in context and reviewing the case before the jury as a whole, the court simply concluded the PPG evidence may have contributed to the jury's verdict, and therefore, error in admitting the PPG evidence was not harmless.[7]

1. Other Evidence Supporting the Jury Verdict

In finding admission of the PPG evidence was not harmless, the court overlooked other, and indeed overwhelming, evidence in the record that more than supported the jury's verdict, even without any of the PPG evidence. Significantly, Dr. Gottfried and Dr. Gillen both diagnosed Appellant with pedophilic disorder, exclusive type, sexually aroused to female prepubescent children; they both based their diagnosis on Appellant's significant sex offense history against prepubescent females and found his sexual attraction to children was current and ongoing; they both found Appellant had engaged in grooming behavior in his sex offenses; they both reached the same scores on the actuarial risk assessments, and testified the scores put Appellant in the average risk to reoffend sexually category when compared to other sex offenders who had reoffended sexually, but that did not necessarily equate to an individual's actual risk; they both found

[6]All evidence is meant to be prejudicial; only unfair prejudice must be scrutinized. *See* State v. Huckabee, 49 S.C. 414, 798 S.E.2d 584, 589 (Ct. App. 2017).

[7]The State does not concede error in the admission of the PPG evidence, but as set forth above, contends there was no error. This harmless error analysis is only in response to the court's harmless error conclusion.

Appellant had multiple dynamic risk factors for sexual reoffending; they both testified pedophilic disorder is chronic but can be treated; they both found Appellant needs treatment for his pedophilia: and they both noted Appellant had not had any sex offender treatment even though he did have an opportunity to get it while he was incarcerated. (R., pp. 179-214, 236-261, 289-291, 305-314, 319, 321-338).

Thus, in terms of the SVPA statutory elements, both experts found Appellant has a mental abnormality that is causally connected to his sexual offending and makes him a risk to sexually reoffend if not treated. The only real point of demarcation between Dr. Gottfried's and Dr. Gillen's opinions was whether Appellant needed to be confined for the treatment he needs to control his pedophilic arousal and urges. The difference in their conclusions on this issue centered on what support system and accountability Appellant would have if released, which had **nothing** to do with the PPG.

Dr. Gottfried testified Appellant had acted on his sexual arousal to children, and "there's nothing that he has demonstrated or that has been done that suggests that he's going to be able [to] stop himself from acting on it again." She stated that Appellant planned to live with his family, get a job, and work with a pastor on rehabilitation and spiritual growth, but nothing indicated Appellant's support system might mitigate his risk to reoffend, he "had no realistic strategies" to control his risk, and he did not know how to avoid reoffending. (R., pp. 256-260).

On cross-examination and re-direct examination, Dr. Gottfried testified she was aware Appellant had probation through January 2025, he would be required to wear a GPS device upon release, and it was likely his probation would require that he seek treatment. She stated she considered all those facts in her evaluation. Further, she stated the support system Appellant would

have if released was essentially the same support system he had when he was offending. (R., pp. 280-282, 293-294).

Dr. Gillen testified Appellant did not need to be confined for treatment because he would be on probation and receive treatment, which would help him work on "things that are still problems for him," he would be monitored at home and by the justice system, and if he was unable to manage his "situation," he would be put in a more restrictive environment. He stated Appellant's parents would be "good supports for him in the community in a risk-relevant way," that would "help mitigate or lessen his risk in the community," and they recognized Appellant has "chronic problems that plague [Appellant]; that's lifelong." On cross-examination, Dr. Gillen acknowledged Appellant "does have some treatment needs," and sex offense specific treatment would "come in handy." (R., pp. 314-320, 336-338).

Appellant's mother testified her husband was 73 years old with health problems, including "forgetfulness," she has Parkinson's disease, she was willing to let Appellant live with them and she was aware of the conditions of his probation. She acknowledged she could not control Appellant, but stated she would make him leave her home and she would call the authorities if she knew Appellant did something he should not do. (R., pp. 346-351).

The jury heard from two experts who agreed on virtually everything except Appellant's need to be confined for treatment. Neither expert's opinion on that issue hinged in any way on the PPG test results, and they did not even reference the PPG when explaining the basis for their opinions on the issue. Rather, their opinions focused on the sufficiency of Appellant's support system if released.

Dr. Gottfried was aware of Appellant's probation requirements and his plan to live with his parents and explained why she thought that was inadequate to prevent Appellant from

reoffending. Dr. Gillen's opinion was based on Appellant's probation, his mother's supervision, and the ability of the legal system to control Appellant's conduct. Significantly, the jury also heard Appellant's mother concede she could not control Appellant even if he lived in her home, which undermined Dr. Gillen's analysis regarding the strength of Appellant's support and accountability system in the community.

The jury was free to accept or reject either expert's opinion on the issue of whether Appellant should be confined to receive the treatment both experts opined he needs. Even without the PPG evidence, there was more than sufficient, indeed overwhelming, evidence to support the jury's determination that Appellant has a mental abnormality (undisputed), his sexual offending was caused by his mental abnormality (undisputed), he needed treatment to help manage his current and on-going deviant urges and arousal (undisputed), and he needed to be confined for that treatment because his restrictions and community support were insufficient. In light of that evidence, any error in admitting the PPG evidence was harmless beyond any reasonable doubt.

2. Dr. Gottfried's PPG Testimony

The court made much of the fact that Dr. Gottfried was the State's sole witness, and stated that "a significant portion of her testimony centered on the PPG test." While it is true Dr. Gottfried was the State's only witness, classifying her PPG test testimony as "a significant portion of her testimony" is misleading and inaccurate.

As a threshold matter, the court stated Dr. Gottfried "emphasized" to the jury that the PPG is an "objective test of male sexual arousal," which mischaracterizes one simple six word statement as "emphasizing" something to the jury. The court then dismissed Dr. Gottfried's testimony about the importance of objectively knowing what sexually arouses the person being evaluated as a mere "claim." Recent studies, research and published articles refer to the PPG as an "objective" way to

measure male sexual arousal. *See, e.g.*, Murphy, L., *et. al.*, Standardization of Penile Plethysmography in Assessment of Problematic Sexual Interests, J. Sex. Med. 12(9): 1853-1861 (2015) (PPG test "has become a standard objective measure of arousal").[8] Thus, Dr. Gottfried's statement was scientifically sound and amply supported rather than a mere "claim."

As to the extent and significance of Dr. Gottfried's PPG testimony, her direct testimony is on pages 168-261 (93 pages) of the record, and her entire PPG testimony during the State's case is on pages 222-235 (13 pages - 14% of her entire testimony). The vast majority of her PPG direct testimony (pp. 222-233 – 11 pages or 85%) was devoted to explaining what the PPG is, describing the test machine and how it works, the standardization and expected results issues (which the court used to find the PPG is not reliable), and MUSC's training and protocols for every PPG performed in its lab. Her testimony regarding Appellant's test is found on pages 233-235, for a total of two pages (2% of her entire direct testimony and 15% of her entire PPG testimony).

In short, eighty pages (86%) of Dr. Gottfried's direct testimony was devoted to her credentials and evidence other than the PPG, including: the facts of Appellant's sex offenses against prepubescent female children; the battery of psychological tests in her evaluation protocol and Appellant's results on those tests; Appellant's statements to her during the clinical interview; her diagnosis of pedophilic disorder, exclusive type, sexually aroused to female prepubescent children; the actuarial risk assessments she used and Appellant's level of risk according to those assessments; Appellant's dynamic risk factors for reoffending; Appellant's need for treatment and lack thereof; Appellant's support system in the community if released; and her ultimate opinion that Appellant met the criteria for civil commitment under the SVPA. Fourteen percent, or

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[8]Other articles and relevant publications are cited on pages 23-26 of the Brief of Respondent.

substantially less than one-fifth, of Dr. Gottfried's entire direct testimony hardly constitutes a "significant portion of her testimony."

Dr. Gottfried's only other testimony regarding the PPG occurred during cross-examination. Appellant's counsel questioned her briefly about Appellant's PPG test, focusing on Appellant's failure to show any arousal to the Marshall stimulus set, that Appellant's results were "exactly what [Dr. Gottfried] expected," and "it's what we all know, he - - he has a pedophilic disorder." (R., pp. 270-272). Thus, even considering Dr. Gottfried's cross-examination testimony, her PPG testimony was not a "significant portion of her testimony." Further, the PPG results evidence was arguably cumulative to the undisputed evidence (discussed above) that Appellant has pedophilia, with current and on-going sexual arousal to prepubescent children.

The State briefly referenced the PPG test during closing argument as only one data point in Appellant's comprehensive psychosexual evaluation, focusing instead on the thoroughness of Dr. Gottfried's evaluation, Appellant's offenses, Appellant's statements to Dr. Gottfried, the issues the two experts agreed on, and the basis for Dr. Gillen's opinion Appellant did not need to be confined for treatment. (R., pp. 360-372). More significantly, Appellant's counsel argued in closing that the PPG merely showed Appellant had a pedophilic disorder, which he admitted. (R., pp. 376-377). Thus, contrary to the court's characterization of Dr. Gottfried's testimony as "centered on the PPG test," the PPG was actually a minimal part of her testimony, the State did not emphasize it in closing, and Appellant admitted the results were expected.

In concluding the purported error in admitting the PPG evidence was not harmless, nothing in the court's opinion indicates the court considered or analyzed any of the other undisputed evidence before the jury. Accordingly, the court should rehear this matter and find that any error from admission of the PPG evidence was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing and the matter set forth in the Brief of Respondent, the State respectfully requests that the court reconsider and rehear this case, reverse its opinion, and affirm Appellant's commitment under the SVPA.

Respectfully submitted,

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable R. Keith Kelly, Circuit Court Judge
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IN THE MATTER OF THE CARE AND TREATMENT OF SHAWN TORLIF DAILY,

APPELLANT

PROOF OF SERVICE

I, Grace Sommer, certify I served the Respondent's Petition for Rehearing on Appellant by email to the Appellant's counsel at the address reflected in the AIS system. The Respondent's Petition for Rehearing has also been filed with the Court of Appeals through the AIS system.

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

This 12th day of July, 2024.

GRACE SOMMER
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Grace Sommer

From:	Grace Sommer
Sent:	Friday, July 12, 2024 11:33 AM
To:	Lara Caudy (lcaudy@sccid.sc.gov)
Cc:	Deborah Shupe; Mcinnis, Sara
Subject:	In the Matter of the Care and Treatment of Shawn Torlif Daily (2022-000371)
Attachments:	DAILY Shawn - Petition for Rehearing (03633475xD2C78).PDF

Good Morning Ms. Caudy,

Attached please find the Respondent's Petition for Rehearing for In the Matter of the Care and Treatment of Shawn Torlif Daily (2022-000371). This Petition will be filed today with the Court of Appeals via the AIS OneDrive System.

If you will, please confirm receipt of this email.

Thank you!

Grace Sommer, Legal Assistant
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