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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Honorable Daniel McLeod Coble, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JEREMIAH JAMES POUGH,

APPELLANT

APPELLATE CASE NO. 2023-001950

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting extensive testimony regarding appellant's compelled PPG test results to the jury since the use of PPG as a diagnostic tool to assert someone has paraphilic coercive disorder is neither standardized nor reliable as required by Rule 702, SCRE, and *State v. Council*¹?

¹ State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

STATEMENT OF THE CASE

On April 4, 2022, the Attorney General filed a petition seeking to involuntarily commit appellant pursuant to the Sexually Violent Predator Act (SVP). R. *. A jury trial was held on November 13 – 16, 2023, before the Honorable Daniel Coble. R. *. Assistant Attorney General Christopher Runyan represented the state. R. *. Bradley Kirkland appeared on behalf of appellant. R. *.

On November 16, 2023, the jury found appellant was a sexually violent predator under the SVPA. Tr. 565, l. 5 – 566, l. 12. Judge Coble ordered appellant be committed to the Department of Mental Health for long term control, care, and treatment. Tr. 568, ll. 2 - 12.

This appeal followed. Following the Notice of Appeal, the state moved for a remand to Judge Coble for a written order on the admissibility of penile plethysmograph (PPG) testing performed by the state's expert, Dr. Emily Gottfried. This Court granted the remand, and Judge Coble issued a written order on the PPG testing on May 31, 2024.

STANDARD OF REVIEW

On November 10, 2021, appellant pled guilty to three offenses in a negotiated plea deal before the Honorable Robert E. Hood. Sentencing Sheets. As part of the negotiated plea, the state agreed on a sentence range of zero to ten years.² Sentence Sheets. Judge Hood sentenced appellant to ten years, with four years active time and five years of probation, served concurrently for three offenses: criminal sexual conduct with a minor (second degree) (victim C.P.); criminal sexual conduct (third degree) (victim A.M.); and criminal sexual conduct with a minor (second degree) (victim M.W.). Sentence Sheets. Prior to completion of the sentence, the state initiated proceedings against appellant under the Sexually Violent Predator Act.³ SVP Petition. The lower court ordered appellant to be evaluated by the S.C. Department of Mental Health on June 22, 2022. Evaluation Order. Appellant was evaluated by Dr. Marie Gehle, who opined that appellant did not meet the SVP criteria. Tr. 394, ll. 13 - 15. The state then elected to have appellant evaluated by Dr. Emily Gottfried with the Medical University of South Carolina for a second opinion.⁴

² Petitioner’s guilty pleas included a sexual battery on an unconscious female who delayed reporting the incident for several months and indicated she had voluntarily gotten into appellant’s car and appellant had driven her to his home where the smoked “weed” and she passed out after which appellant sexually assaulted her. SVP Petition A.M. statement. In his interviews, appellant indicated he pled guilty to the offense because of deal prosecutors were offering, in essence a buy one get two free plea negotiation. Tr. 236, ll. 2 – 17. The evaluators presented differing opinions on the importance of this sexual assault as noted *infra*.

³ Commitment under S.C. Code Ann. § 44-48-30 (2012) requires a finding that the offender suffers from a “mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.” The Sexually Violent Predator Act was amended in 2023, but this matter was tried under the 2012 version of Act.

⁴ The state’s use of MUSC for a second opinion fits a pattern. See Matter of Hyman, No. 2021-000734 (S.C. Ct. App. July 24, 2024)(involving Dr. Gehle and Dr. Gottfried); Matter of Gregg, No. 2019-001954 (S.C. Ct. App. Aug. 10, 2022) (involving Dr. Gehle and Dr. Gottfried). In

The two experts agreed on several matters. Appellant completed a Static-99R risk assessment and Dr. Gottfried noted a score of 8 (on a -3 to 12 range) and a Static-2002R of 6 (on a -2 to 13 range), both of which placed appellant in the above average risk category for re-offending.⁵ Tr. 270, l. 25 – 273, l. 24. This was an area of agreement with Dr. Gehle who obtained the same scores. Tr. 477, ll. 3 – 25. Both experts diagnosed appellant with cannabis use disorder. Tr. 385, ll. 19 – 24. The main points of departure between the two expert witnesses were the final diagnosis of paraphilic coercive disorder and the diagnostic value of PPG testing. As noted, Dr. Gottfried used the PPG results and determined appellant suffered from a “mental abnormality or personality disorder” within the terms of S.C. Code Ann. § 44-48-30. Dr. Gehle, absent the influence of the PPG test, found that appellant did not meet the diagnostic criteria of paraphilic coercive or any other mental abnormality that made it likely he would re-offend.

Dr. Gottfried performed a penile plethysmograph (PPG) test as part of her exam. For the jury, she relayed:

Mr. Pough demonstrated arousal to numerous trials across the PPG examination. He demonstrated arousal to the rape or sexual violence on every single trial given to him, I think with the exception of one. So that was about nine trials. He demonstrated clinically significant sexual arousal to rape which is consistent with his offenses. He also demonstrated arousal to consenting adults.

Tr. 254, ll. 6 – 12.

some cases, Dr. Gehle’s role has been played by other employees of the S.C. Department of Mental Health, but the pattern is the same. *See Matter of Daily*, No. 2022-000371 (S.C. Ct. App. June 12, 2024) (Dr. Christopher Gillen); *Matter of Williford*, No. 2021-000733 (S.C. Ct. App. July 24, 2024) (Dr. Rozanna Tross).

⁵ For the Static-2002R test, the expected recidivism rate on a score of six was “approximately 34 percent.” Tr. 273, ll. 11 – 20. For a Static-99R score of 8, that expected recidivism rate was 50.3 percent. Tr. 272, ll. 13 – 22.

She elaborated further noting:

So his arousal to consenting adults was about equal to his arousal to rape. And then on one of the sets his arousal to consenting adults was greater. And then on the third set that we gave him his arousal to the rape trials were demonstrated a preference for the rape over the consenting adults.

Tr. 254, l. 22 – 255, l. 2.

Counsel for appellant filed a written motion *in limine* contesting the reliability of PPG testing under Rule 702, SCRE, and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (requiring a finding the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.). The trial judge conducted a hearing in which Dr. Gottfried testified and both sides presented argument over the reliability of PPG testing. Tr. 68, l. 9 – 185, l. 25.

Ultimately, the trial judge found that the PPG testing would assist the jury, that Dr. Gottfried was qualified as an expert on PPG, and that the underlying science was reliable. Tr. 178, l. 15 – 185, l. 10.⁶ The trial judge also determined, under Rule 403, SCRE, that the probative value of the PPG testimony outweighed its prejudicial impact. Tr. 185, ll. 1 – 10. After opening instructions and statements from both parties, the state called Dr. Gottfried as its first witness and elicited extensive PPG related testimony. Tr. 210, ll. 15 – 20.

Dr. Gottfried related her opinion that appellant suffered from “paraphilic coercive disorder.” Tr. 259, ll. 10 – 23. She formed the opinion based upon:

So, Mr. Pough has been convicted of raping two teenage girls and molesting another. There's evidence that he was sexually aroused during these sexual encounters. There's evidence that once he became aware that the victims were distressed and not consenting

⁶ On remand from this Court, the trial judge signed a formal order outlining his verbal ruling. Order Allowing PPG Testimony.

that he did not stop those rapes. Also, his offenses occurred in a relatively short time period, so kind of one after another. He described having girlfriends at the time of these offenses, so that means that he offended even though he had purportedly a willing consenting sexual partner. *And then the results of the PPG examinations that I gave him demonstrated sexual arousal to rape and sexual violence.*

Tr. 262, ll. 7 – 18 (emphasis added).

In describing paraphilic coercive disorder, Dr. Gottfried testified that it involved “intense, preferential sexual arousal to sex with somebody who cannot consent, who is not consenting, but it more represents like the arousal to the power, to the control, to the non-consensual nature versus the -- the fact that they're having sex itself, itself.” Tr. 311, l. 25 – 312, l. 5. Dr. Gottfried also found appellant had “traits” of narcissistic personality disorder although he did not meet the criteria for a specific personality disorder diagnosis. Tr. 263, l. 22 – 266, l. 5. She further diagnosed him as having cannabis use disorder. Tr. 267, ll. 3 – 24.

The PPG test was sold to the jury as an objective test of male arousal. The state referred to the PPG results extensively in closing argument, noting:

The PPG is an objective measure of male sexual arousal. It's used across many different fields. I think Dr. Gottfried testified to using erectile dysfunction. I think she talked about heart issues. And she also talked about it's used in sexually violent predator treatment programs. And she talked about it being used as a diagnostic tool for a sexual arousal.

Tr. 506, ll. 3 – 10.

STANDARD OF REVIEW

“A trial court’s decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion.” State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

However, the trial courts have

a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to ‘weight, not admissibility’ may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009).

ARGUMENT

The trial judge erred in admitting extensive testimony regarding appellant's compelled PPG test results to the jury since the use of PPG as a diagnostic tool to assert someone has paraphilic coercive disorder is neither standardized nor reliable as required by Rule 702, SCRE, and *State v. Council*.⁷

Under S.C. Code Ann. § 44-48-30 (2012), the state bears the burden to establish that appellant suffers from a “mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.” As noted, Dr. Gehle with the S.C. Department of Mental Health evaluation did not support a finding the appellant suffered from a mental abnormality or personality disorder. Tr. 391, ll. 13 – 22. Dr. Gottfried with MUSC related her opinion that appellant suffered from “paraphilic coercive disorder.” Tr. 259, ll. 10 – 23.

Paraphilic coercive disorder involves:

a pattern of deviant sexual interest that lasts over a period of six months. That's intense and preferential. So we -- so in looking at those paraphilic disorders in every case, and then the personality disorders, antisocial personality disorder, that has the most relationship with sexual offending in these cases. I consider other personality disorders. That's the one that I'm going to consider most highly.

Tr. 387, ll. 1 – 9.

The experts disagreed over the impact of some of the underlying criminal offenses regarding paraphilic coercive disorder, with Dr. Gehle expressing doubt that the nature of the

⁷ *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

offenses themselves indicated an arousal caused by coercion rather than the sexual acts themselves.⁸ Tr. 399, l. 11 – 400 l. 4.

In Dr. Gehle's opinion, the limited nature of information available regarding the underlying crimes as it related to appellant's sexual arousal made a paraphilic disorder diagnosis difficult:

So for -- for the diagnosis that I would consider in this case, the -- whether he is sexually aroused by non-consent and coercive acts with non-consenting person. It complicates things. Makes it, you know, sometimes impossible to make the conclusions because they really need to see what she did, what he did, like in reaction, what she did reaction, what he did reaction. So I need to see that interplay.

And that be documented because I need to see that the arousal was to the non-consent. Sometimes it's easier with -- when somebody is sexually aroused by coercive sexual acts with a non-consenting person, you'll see things like threats escalation in reaction to resistance. You'll see victims, you know, screaming, fighting and they have to overcome that. And they do anyways. So in this case, there's some indication that she was saying, no, we don't see what he did next. We don't see that full, like, documented interaction.

Tr. 398, l. 17 – 399, l. 9 (referencing the interaction with C.P.).

Gottfried and Gehle contrasted sharply regarding the use of PPG testing. Dr. Gehle testified that:

The problems are related to whether it's generally accepted in by psychologists who do this type of work. And the vast majority of them don't use this assessment in the sexually violent predator cases. Some do, but the vast majority do not use them. And then there's problems with the reliability and validity and standardization. So the test is not standardized.

⁸ “So when -- when Mr. Pough gets resistance from her, then it stops. It's not -- it doesn't escalate. He's not attracted to that non-consent. He's not attracted to that, you know, coercion and taking and power over her in that way.” Tr. 407, ll. 9 – 15 (referencing the interaction with A.M.).

Each center gives it in different ways. Interprets the results in different ways, sets their cut scores in at different places. They can give a wide variety of stimulus sets. And so it's very difficult under those conditions when a test isn't standardized to look at the overall research body and say that this is a valid and reliable test that you give at your center, because those -- that research is relying on testing that could be had -- could have been done very differently than you give yours.

Tr. 392, l. 16 – 393, l. 6.

To establish coercive paraphilic disorder, Dr. Gottfried relied extensively on the results of the PPG administered by MUSC on appellant. The trial court erred in admitting this testimony due to its unreliability and lack of standardization for diagnosing coercive paraphilic disorders. Recently, this Court issued a definitive ruling finding that since “PPG is not reliable, as required by Rule 702, we find the trial court abused its discretion in admitting the PPG test results.” Matter of Daily, No. 2022-000371 (S.C. Ct. App. June 12, 2024).

This case mirrors Daily in the manner in which it proceeded. Counsel for appellant filed a written motion *in limine* contesting the reliability of PPG testing under Rule 702, SCRE, and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (requiring a finding the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.). As in Daily, the trial judge conducted a hearing in which Dr. Gottfried testified and both sides presented argument over the reliability of PPG testing. Dr. Gottfried testimony including acknowledgements about the lack of standardization over the stimuli set used (Real Child Voices, the Marshall Set, and actual pornographic material) and the cut scores to indicate medically significant signs of arousal. Tr. 100, l. 1 – 102, l. 6. Dr. Gottfried acknowledged problems regarding lack of expected arousal response. Tr. 102, ll. 7 – 18. Dr. Gottfried acknowledged there were no studies on the efficacy of PPG for pre-commitment evaluations on those have coercive paraphilic disorder. Tr. 117, ll. 1 – 11. This is related to the fact that most of

the research related to PPG testing involves arousal to minor children and pedophilia. Tr. 117, 12 – 18. Dr. Gottfried acknowledged the problems with admission of PPG test results in court. Tr. 119, ll. 16 – 21. Dr. Gottfried noted that most SVP evaluators responding to surveys did not use the PPG. Tr. 139, l. 9 – 140, l. 1. Dr. Gottfried acknowledged there were no control group studies outside of pedophilia on the efficacy of PPG.⁹ Tr. 141, l. 9 – 143, l. 2.

As in Daily, the trial judge found that the PPG testing would assist the jury, that Dr. Gottfried was qualified as an expert on PPG, and that the underlying science was reliable despite the admissions by Dr. Gottfried. Tr. 178, l. 15 – 185, l. 10. The trial judge also determined, under Rule 403, SCRE, that the probative value of the PPG testimony outweighed its prejudicial impact. Tr. 185, ll. 1 – 10. Immediately after this ruling, the state called Dr. Gottfried as its first witness and presented the PPG testimony to the jury.

In the press to obtain “justice” prosecutors have at times ignored admonitions from our appellate courts regarding improper evidence. This can be seen in the numerous cases regarding the use of a forensic interviewer or other expert to bolster and vouch for the testimony of a minor. As early as 2009, both this Court and the Supreme Court provided ample warning that using such a witness to vouch for the veracity of the minor was improper. See State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *aff'd in part, rev'd in part*, 380 S.C. 499, 671 S.E.2d 606 (2009) (finding that the testimony of the forensic interviewer, including

⁹ “In addition, phallometry is sometimes used to assess for sexual sadism (persistent and intense sexual arousal from causing or fantasizing about the physical or mental suffering of another person, with or without their consent). However, its clinical utility in this area of practice is controversial for two reasons. First, although the key features of sexual sadism are included in the current editions of the DSM and the ICD, some commentators regard sexual sadism as ‘an elusive concept to define and measure’. Second, the evidence base concerning the utility of phallometry for the identification of sexual sadism is limited, especially when considered next to the evidence concerning the identification of paedophilia.” Bickle A, et al. *International overview of phallometric testing for sexual offending behaviour and sexual risk*. BJPsych Int. 2021 Nov;18(4):E11. doi: 10.1192/bji.2021.17. PMID: 34747938; PMCID: PMC8554943.

explaining to the minor the need to tell the truth, was not improper bolstering). After Douglass, a clear statement by our Supreme Court on this type of testimony was provided: allowing an “expert to comment on the veracity of a child’s accusations of sexual abuse is improper.” State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). Despite these clear warnings about improper use of such bolstering testimony, prosecutors continued to use expert testimony to bolster and vouch for a minor’s credibility. See State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (holding that “even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary purpose for calling a “forensic interviewer” as a witness is to lend credibility to the victim’s allegations.”); State v. Anderson, 413 S.C. 212, 220, 776 S.E.2d 76, 80 (2015) (“The record in this case and in the child sex abuse cases that have come before us in recent years demonstrate that the common practice is to present the forensic interviewer to jurors as a ‘human lie-detector.’”); State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (noting an expert’s opinion that minor not be around the accused for any reason could only be interpreted as the expert believing and vouching for minor); State v. Makins, 433 S.C. 494, 505, 860 S.E.2d 666, 672 (2021) (“While we find no improper bolstering occurred in this case, we repeat our warning in *Anderson* about dual experts. Using one witness as both a characteristics expert and the treatment witness is a risky undertaking.”).

In the same manner, prosecutions under the SVP Act have followed a similar pattern. Despite numerous cases warning about the reliability of penile plethysmograph (PPG) testing, prosecutors have continued to bolster the opinion of their retained experts with use of and reliance upon PPG testing results. PPG was first mentioned by our appellate courts in In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) (upholding

constitutionality of the SVP statute). It was mentioned in its relationship to the active treatment of those who have been confined as sexually violent offenders. See In re Care & Treatment of Tucker, 353 S.C. 466, 469, 578 S.E.2d 719, 721 (2003) (Noting appellant was “administered a Penile Plethysmograph (PPG), which is designed to measure sexual responsiveness to a variety of stimuli across gender, age, and sexual activity.”). PPG was again mentioned, in an unpublished opinion, as a test performed in connection with a sexually violent evaluation, though the results of the test were not disclosed to the jury. See In re Farmer, No. 2005-UP-438 (S.C. Ct. App. July 14, 2005). In McClam v. State, 386 S.C. 49, 686 S.E.2d 203 (Ct. App. 2009), it was noted that the Circuit Court ordered a PPG evaluation as part of a petition for release from confinement under the SVP statute in an appeal that was ultimately dismissed as moot.

Attacks on the admissibility of PPG as part of the initial confinement determination was noted in Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020). In Bilton, this Court dealt with the use of PPG test results by an expert that did not administer or observe the test, serving as a mere conduit to the work performed by a different expert. In addition to that issue, this Court noted “some authorities take the position that the PPG has value in treating sex offenders but that concerns about reliability and a lack of uniform standards preclude its admission as evidence at trial.” Id., 432 S.C. at 164, 851 S.E.2d at 445. This reliability challenge continued with this Court reversing a confinement verdict and remanding for a new trial following the admission of PPG test results in an unpublished decision. See Matter of Gregg, No. 2019-001954 (S.C. Ct. App. Aug. 10, 2022), *cert. dismissed as improvidently granted*, No. 2022-001710 (S.C. June 5, 2024). Recently, in Dailey, this Court issued a definitive ruling finding that since “PPG is not reliable, as required by Rule 702, we find the trial court abused its discretion in

admitting the PPG test results.” Matter of Daily, No. 2022-000371 (S.C. Ct. App. June 12, 2024).¹⁰

The PPG evidence was highly prejudicial. Dr. Gottfried presented the jury with specific details from the PPG testing:

So, Mr. Pough demonstrated arousal to numerous trials across the PPG examination. He demonstrated arousal to the rape or sexual violence on every single trial given to him, I think with the exception of one. So that was about nine trials. He demonstrated clinically significant sexual arousal to rape which is consistent with his offenses. He also demonstrated arousal to consenting adults. And so that's kind of the first step. You look at the individual trials, so the ones featuring rape, the ones featuring consenting adults, and then you want to compare their arousal to those stimuli compared to their arousal to consenting adults.

And you -- you kind of calculate them differently based on -- well, separately, I mean like based on the real child voices set and the Marshall set. And so across those trials depending on if it was the Marshall or the real child voices, he demonstrated either equal. So his arousal to consenting adults was about equal to his arousal to rape. And then on one of the sets his arousal to consenting adults was greater. And then on the third set that we gave him his arousal to the rape trials were demonstrated a preference for the rape over the consenting adults.

Tr. 254, l. 6 - 255, l. 2.

Dr. Gottfried relayed appellants' surprise about his PPG results to the jury:

He said that he hadn't been aware of it. But that he -- he said like, there -- he said, "You cannot feel it." So sometimes people will say like, "No -- no, that test is wrong." Like, "I wasn't aroused by that." But he said like, "Yes, I was aroused. I -- I felt that arousal."

He said that if that's what the result showed, then that's what happened. He said that he was shocked by the results and that he had called his mom after the test to, I guess, share that with her.

¹⁰ Additional cases involving PPG followed Daily with this Court reversing confinement verdicts and remanding for new trials in unpublished opinions. See Matter of Hyman, No. 2021-000734 (S.C. Ct. App. July 24, 2024); Matter of Williford, No. 2021-000733 (S.C. Ct. App. July 24, 2024).

But he -- he didn't say, "I'm not aroused by this." He said, "Yes, I'm aware that that happened on the test." And -- and it shocked me. And -- and kind of asked like, *"Does that mean there's something wrong with me mentally?"* And he said that like he didn't expect to be aroused by that, but acknowledged, or, I guess at the very least, he didn't deny that that arousal was present in the lab.

Tr. 255, l. 19 – 256, l. 10 (emphasis added).

The solicitor drove the “value” of the “objective” PPG test home to the jury during closing argument:

The PPG is an objective measure of male sexual arousal. It's used across many different fields. I think Dr. Gottfried testified to using erectile dysfunction. I think she talked about heart issues. And she also talked about it's used in sexually violent predator treatment programs. And she talked about it being used as a diagnostic tool for a sexual arousal.

And the question we have to answer, or you have to answer is like Mr. Kirkland told you in his opening is today, as Mr. Pough sits here, is he a sexually violent predator? Dr. Gottfried gave him this test in April of this year. I think it was April, May of this year. Now, I want you to remember the results of that test. She testified that she gave him the Real Child Voices and the Marshall Set. And that he had clinically -- and on the Real Child Voices Set, he had clinically significant arousal. I remember what clinically significant arousal is.

She told you they have a baseline and they have a max during the trial. And that change in circumference of blood flow to the penis, they measured that from baseline to max. And that's -- that's the millimeters of arousal. And she told she uses that conservative cut score. They look for five millimeters of arousal because they, they're more interested in finding, not finding an interest than having an interest and not it -- it not being right.

So in these evaluations, you want to use that conservative cut score because you don't want to say somebody has something and they don't. So five millimeters or greater on the Real Child Voices, clinically significant arousal to a rape of adult woman, persuasion of an adolescent female, exhibitionism against an adult woman, a consenting adult woman and rape of an adolescent female victim. He had clinically significant arousal to those things on the

Marshall Set. He had clinically significant arousal to sexual violence against a pubescent female victim. And pubescent would be you know, like a teenager. Trials consisting of an adult woman, a consenting adult woman trials featuring a -- a passive pubescent female victim. Trials featuring the rape of a pubescent female victim.

And then on the second Marshall Set trials of a featuring a rape adult woman and -- and two trials featuring a consenting adult woman and two trials depicting sexual violence against an adult woman. Excuse me. And what she said to you, what was important about this, these different trials is that I think she said nine of -- nine of the 10, there was only one trial that had deviant arousal that he didn't have clinically significant arousal to. And what's important about this is that his arousal to these adult rape scenarios and that the pubescent female scenarios, what's important about that is it matches his offending. He's showing clinically significant arousal today when she gave him the test and it matches his offending pattern. And that's important to her. Even more important, I think she told you that on some of the trials, his -- his arousal -- max arousal to consenting women was equal to his arousal to non-consenting women or in rape scenarios. And some of the trials, his max arousal was greater to those deviant sexual interests than it was to consenting adult women. She said what that means is he shows a preference for section -- sexually deviant arousal.

Tr. 506, l. 3 – 508, l. 14.

The admission of the PPG testimony was improper under Rule 702, SCRE, since the state failed to meet its burden to show the test was reliable tool to diagnose paraphilic coercive disorder. It is important to note the impact the use of PPG on the outcomes of SVP cases. During her testimony, Dr. Gehle indicated she opines an individual qualified under the SVP Act about 33% of the time. Tr. 425, l. 21 – 426, l. 8. In contrast, Dr. Gottfried, with the benefit of PPG testing, *and only on referral for a second opinion by the state*, captures 51.7% of individuals rejected by the S.C. Department of Mental Health. Tr. 285, ll. 3 – 7. So, out of a hypothetical 100 evaluations, Dr. Gehle would find 67 individuals did not meet the criteria and 33 would meet the criteria. By referring those 67 individuals cleared by Dr. Gehle under the

SVP Act to Dr. Gottfried, the state would obtain a diagnosis in slightly over half, an additional 34 individuals, in no small part based on the impact of PPG testing. Combined, the state would obtain a qualified diagnosis in 67 of those 100 hypothetical cases.

CONCLUSION

As with the use of a forensic interviewer to bolster the testimony of minors, the continued use of PPG to enhance the opinion of the state's expert in SVP cases should concern this Court. In light of Dailey, the present case presents clear error requiring reversal and remand for a new trial.



Gary H Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of September, 2024.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Kershaw County

Honorable Daniel McLeod Coble, Circuit Court Judge

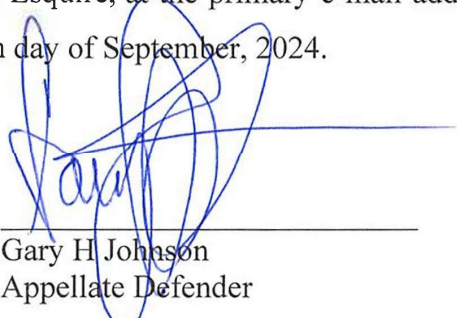
IN THE MATTER OF THE CARE AND
TREATMENT OF JEREMIAH JAMES POUGH,

APPELLANT

APPELLATE CASE NO. 2023-001950

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 13th day of September, 2024.



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