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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
The Honorable R. Keith Kelly, Circuit Court Judge
Court of Appeals Appellate Case No. 2022-000371
Supreme Court Appellate Case No. 2024-001707
Opinion No. 6061

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

RESPONDENT.

**STATE OF SOUTH CAROLINA'S REPLY TO RESPONDENT'S
RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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ARGUMENT

Using mischaracterizations, misrepresentations and a truncated version of Dr. Emily Gottfried's testimony, Respondent engages in the same type of limited analysis the court of appeals used in this case. Respondent's repeated use of the words "claimed," "conceded," "admitted," and "contended" throughout the "Statement of the Case" in his Return demonstrates his efforts to marginalize and distract from Dr. Gottfried's extensive and undisputed sworn testimony regarding the use and acceptance of the PPG as a valid scientific method of measuring male sexual arousal. The State craves reference to the Petition for a Writ of Certiorari, the Final Brief of Respondent before the court of appeals and the Appendix for Dr. Gottfried's actual testimony, including: 1) the context of her testimony regarding standardization; 2) her full explanation of unexpected results in PPG tests; 3) research and publications regarding the PPG; 4) the PPG's margin of error; 5) use of the PPG in evaluations as well as treatment; 6) internal re-testing in PPG tests; 7) the extensive quality control measures Dr. Gottfried's lab utilizes to ensure as much accuracy as possible in every PPG test; and 8) her use of the PPG test data in formulating her opinions regarding Respondent.

Respondent fails, as did the court of appeals, to analyze the evidence before Judge Kelly, much less his detailed findings on each Jones/Council factor with references to the specific evidence on which he relied. Respondent does not show how any of Judge Kelly's findings and conclusions lacked evidentiary support. The reason for that failure is simple – those findings and conclusions were amply supported by the undisputed evidence.

Respondent asserts Dr. Gottfried "vaguely maintained that the PPG has been subjected to peer review," and her testimony regarding peer review of the Real Child Voices (RCV) stimulus

set was “conclusory.” When read in its entirety and in context, however, Dr. Gottfried’s testimony about peer review of the PPG and the RCV stimulus set was anything but “vague” or “conclusory.”

Dr. Gottfried testified she personally had at least four or five peer reviewed publications regarding her research on the PPG, as well as ten to twelve peer reviewed presentations about it at national professional conferences. (Appendix, pp. 23-24). She further testified the PPG has been studied and peer reviewed at least one hundred times, which included sex offending literature as well as general sexual health literature (looking at erectile dysfunction and general sexual wellbeing and health).¹ (Appendix, p. 29). That testimony is hardly “vague.”

Notably, Respondent ignores Dr. Gottfried’s testimony regarding the recognition and acceptance of the PPG by the Association for the Treatment of Sexual Abusers (ATSA), a national professional organization that sets guidelines and ethical standards for professionals working in the field of sex offender evaluation and treatment, as well as the Diagnostic and Statistical Manual, 5th Ed., (DSM-5) statement that the PPG is “the most thoroughly researched and longest used [psychophysiological measure of sexual interest].” (emphasis added). (Appendix, pp. 33-38). He also ignores her testimony about a 2019 meta-analysis that combined data from multiple studies with PPG results from over 9500 men, which found a “staggering” rate of accuracy differentiating between men with no known sex offenses and men who had committed sex offenses against children. (Appendix, pp. 47-48). Dr. Gottfried’s undisputed testimony considered as a whole, and in context, clearly supports Judge Kelly’s finding that the PPG has been subjected to extensive peer review and publication.²

¹Respondent incorrectly quotes the testimony as “general sexual literature,” rather than “general sexual health literature.” While appearing irrelevant, this difference is highly relevant in light of the Food and Drug Administration’s and BlueCross/BlueShield’s recognition of the PPG as a valid medical test. (Appendix, pp. 624-625).

²A substantial number of scholarly articles, as well as case law, regarding the PPG are cited in the Final Brief of Respondent. (Appendix, pp. 620-624). In reversing Judge Kelly’s ruling, the

Regarding the RCV stimulus set, Dr. Gottfried testified that while the Marshall stimulus set had been studied and used for many years, and the RCV “had been the subject of more studies. . . [it]’s been established; it’s been used for a long time.” She then testified she used both the Marshall and RCV stimulus sets as part of her multimethod assessment “because the literature suggests that the slide plus audio (RCV) . . . has the highest reliability in a PPG.” (Appendix, p. 47) (emphasis added). She subsequently testified the RCV stimulus set has been peer reviewed, and explained in detail the peer review process, including the fact that she is a peer reviewer. (Appendix, pp. 49-50). Logically, if the literature has found that slide plus audio stimulus sets are highly reliable, the RCV, which is slide plus audio, has been reviewed and found to be reliable.

Respondent also asserts Dr. Gottfried “openly admitted there is a lack of standardization in the stimulus sets used by PPG examiners,” and “admitted there is a lack of standardization in the scoring, and “conceded standardization is a problem.” These assertions take Dr. Gottfried’s testimony out of context, and the context of her testimony regarding “standardization” is critical.

Dr. Gottfried testified in detail about the “standardization” issue, and stated “what’s driving that is that other countries can do things that other countries can’t do.” She gave the example of Canada’s ability to use child pornography in its stimulus sets while United States labs cannot, which is “probably the biggest criticism,” and testified she is part of an international committee working on standardization between countries. (Appendix, pp. 40-41).

On cross-examination, when asked if there was any standardization between different stimulus sets, Dr. Gottfried testified the stimulus sets are already produced, and the examiner hits a button to start the set. She then stated the stimulus sets “would be standardized because everybody that uses [a stimulus set] is using the same [stimulus set]. (Appendix, pp. 62-63).

court of appeals relied on outdated articles and cases, and ignored the more current articles and the case law from other jurisdictions finding the PPG is reliable and admissible.

Considered in context, Dr. Gottfried testified only that there is a standardization issue between international labs using the PPG, not in general in the United States. She also testified the stimulus sets used in the United States are standardized, every lab using a particular stimulus set is using the standard set, and the RCV is being used in a substantial number of labs in the United States.

Further, even if labs utilizing the PPG use different stimulus sets, the raw data generated by the test remains the same. In addition, the fact that labs may use different “cut scores” for significant arousals goes to the interpretation of the raw data, while the raw data remains the same. Dr. Gottfried testified she chooses to use a higher cut score than the literature recommends because of the high stakes involved in SVPA cases, and she would rather have false negatives (the person is aroused by a particular scenario but it does not show as significant on the PPG) than false positives (the person is not aroused by a particular scenario but shows a significant arousal on the PPG). Differences in the stimulus sets and cut score used by the interpreter are matters that can be explored on cross-examination and through testimony from other experts.

Respondent makes the conclusory argument that Judge Kelly “appeared to ignore this evidence concerning the lack of standardization and based his ruling in large part on Dr. Gottfried’s testimony that over fifty laboratories throughout the United States use the Real Child Voices stimulus set.” To the contrary, Judge Kelly made specific findings regarding the standardization issues, and neither the court of appeals nor Respondent have shown those findings were not supported by the undisputed evidence presented to him.

Respondent next contends Dr. Gottfried “explained that another recognized problem is that the PPG does not ‘always have expected results.’” Again, context is crucial.

Dr. Gottfried testified “it’s been noted that the PPG doesn’t always have expected results,” specifically a person with offenses against children does not always show arousal to children on a PPG. She then explained she did not agree with that argument because people offend against children for numerous reasons, only one of which is sexual arousal to children, and a person who offends against children for some reason other than sexual arousal would not be expected to be aroused to children on a PPG. She reiterated that explanation on cross-examination. (Appendix, pp. 41, 63). In short, while “unexpected results” had been mentioned in the literature, Dr. Gottfried explained there were valid reasons why a person who molested children might not show arousal to children during a PPG, and made it clear she did not agree with that criticism. Judge Kelly was free to, and clearly did, accept Dr. Gottfried’s explanation regarding “unexpected results.”

Respondent then asserts Judge Kelly improperly “credited Dr. Gottfried’s testimony about the quality control procedures,” claiming the only quality control procedures she testified about “were designed to prevent individuals from cheating.” This assertion is astoundingly misleading and plainly inaccurate. Dr. Gottfried testified about the quality control procedures in the lab, which begin well before the test even starts. Those procedures include: 1) everyone involved in the lab’s PPG process is trained and certified to perform their particular part of the test; 2) the lab uses a standard protocol in every PPG test performed and every test is performed in the same way; 3) the strain gauge must be calibrated three times and the computer will not start the test until the gauge is “perfectly calibrated;” 4) the test room’s humidity is controlled; 5) the test room sound system is checked; 6) the person’s respirations are monitored during the test; 7) the person’s movements are measured; 8) the person presses a number on a keypad whenever the scenario they are listening to becomes sexual or violent to ensure the person is paying attention during the test; 9) the technician administering the test will intermittently ask the person to briefly describe the scenario

they just heard as another way to ensure the person is paying attention; and 10) the person is not allowed to touch their penis during the test. (Appendix, pp. 29-31, 234-236). These quality control procedures go far beyond merely preventing the person from cheating on the test, and are consistent with procedures employed by countless other scientific labs conducting scientific tests.

Respondent claims the lab's quality control measures "did not relate to one of the central concerns with PPGs – whether the subjects are aroused by what the stimulus set claims in the focus of the arousal." Respondent cites nothing in the record indicating that such a "concern" was presented to Judge Kelly, or even to any article making that claim. Further, this previously unasserted claim is refuted by Dr. Gottfried's testimony that the Marshall and RCV stimulus sets include multiple stimuli presentations that relate to the person's offending history, and the interpreter looks at the consistency between those similar presentations, which is essentially a re-test within the test itself, and an indication the person is aroused by the focus and contents of those scenarios. (Appendix, p. 64).

Respondent relies heavily on the court of appeals' reference to Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), citing *dicta* from the Bilton opinion that was based on the same outdated articles and case law Respondent cites in support of his argument.³ Respondent then summarily claims that "esoteric" and "junk science" accurately describe the PPG test. This claim ignores, as did the court of appeals, the extensive amount of scientific research, studies and peer reviewed scholarly articles in scientific journals and presentations at national and international scientific conferences that clearly establish the PPG is neither esoteric (intended for

³Notably, relying on a 2006 Ninth Circuit Court of Appeals opinion, the Bilton court erroneously found that Dr. Gottfried's lab "compels the subject to arouse himself sexually and then forces him to view deviant stimulants." *Id.* at 444. Dr. Gottfried categorically put that assertion to rest in this case. (Appendix, p. 31).

or understood by only a small group) or “junk science” (assertions that have the appearance, but not the actuality, of scientific support).

As established by the research articles and presentations cited in the Final Brief of Respondent, the PPG is now widely accepted as a valid, objective measure of male sexual arousal with application and use in the general health and mental health communities. The mere fact some may consider the PPG “controversial” does not render the PPG either esoteric or junk science.⁴ Literally every scientific test was labeled as esoteric or junk science at one point, but gradually, after research and study, it was accepted as valid by many in that particular field. Such is the case with PPG testing.

Respondent ignores the substance of the harmless error argument set forth in the Petition, and just as the court of appeals did, makes the unsupported claim that the PPG was “one of the main bases for [Dr. Gottfried’s] diagnosis of pedophilic disorder and her conclusion that Respondent ‘is at a high risk to reoffend.’” As Dr. Gottfried repeatedly testified, the PPG test results was only one data point in her multimethod evaluation, and as discussed in the Petition, it did not constitute a significant part of her testimony before the jury.

Further, Respondent completely ignores the other and overwhelming evidence presented to the jury, which is set forth in the Petition, that provides ample support for the jury’s verdict, even without the PPG evidence.⁵ Both experts diagnosed Respondent with pedophilia, both testified pedophilia is a chronic, lifelong paraphilia, both found he had multiple dynamic risk

⁴ Indeed, a prominent mental health expert in South Carolina has testified that the Static99-R risk assessment is unreliable, but the Static99-R is accepted and used by virtually every other mental health expert in the field of sex offender risk evaluations. See Matter of Chapman, Appellate Case No. 2014-001181, Record on Appeal, pp. 64-67, 238-245, 252).

⁵ During his closing, Respondent stated he did not disagree with the PPG test results, and the only thing it showed was that Respondent has pedophilia, **which he admitted**. (Appendix, p. 380). In short, Respondent argued the PPG was irrelevant to the jury’s decision.

factors for reoffending, including a sexual preference for children, and both testified Respondent needed treatment to learn how to manage his pedophilia. As discussed in the Petition, the experts' only disagreement was whether Respondent needed to be confined for treatment, and their opinions on that issue had nothing to do with the PPG. Given the limited testimony regarding the PPG test results, and the State's very limited reference to it in closing, especially when considered with Respondent's admissions about it, if the jury gave the PPG any credence, it was secondary to the other overwhelming evidence establishing Respondent is a sexually violent predator as defined by the SVPA, and he needed to be confined for long term control, care and treatment to develop strategies to control his pedophilic urges.

CONCLUSION

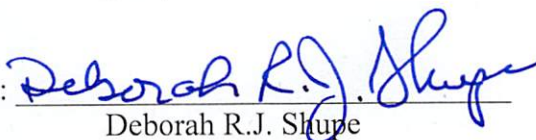
Based on the foregoing, the matter set forth in the Petition for a Writ of Certiorari, the Final Brief of Respondent before the court of appeals, and the Appendix, Petitioner submits this Court should grant the Petition for a Writ of Certiorari to the Court of Appeals, reverse the court of appeals opinion, and affirm Respondent's commitment as a sexually violent predator.

Respectfully Submitted,

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