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STATE OF SOUTH CAROLINA

S.C. SUPREME COURT COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

COUNTY OF CLARENDON

In the Matter of the Care & Treatment of
Alonza Gibson Jr.,

Case No. 2022-CP-14-0547

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Mar 25 2025

SC Court of Appeals

Respondent)

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO EXCLUDE

Respondent Alonza Gibson ("Respondent"), by and through his undersigned counsel, hereby submits this Memorandum in support of his Motion in Limine. Respondent seeks to exclude the Petitioner's expert witness, Dr. Emily Gottfried, from testifying in this case. In the alternative, Respondent seeks to exclude any testimony, evidence, statement, or inference by Dr. Emily Gottfried related to the penile plethysmography that she administered to Respondent. Dr. Gottfried's conclusions about whether Respondent meets the definition of a sexually violent predator are based in part on Respondent's irregular PPG results which are unreliable. Moreover, such testimony will also improperly confuse and mislead the jury. Therefore, Respondent respectfully requests that Dr. Gottfried's testimony be excluded.

BACKGROUND

On December 14, 2022, the State of South Carolina ("State") filed a Petition seeking Respondent's involuntarily commitment pursuant to S.C. Code § 44-48-10 *et seq.* of the Sexually Violent Predator Act. Prior to the filing, both the Multidisciplinary Team and the Prosecutor's Review Committee found probable cause to believe that Respondent met the criteria for civil commitment. By Order signed February 3, 2023, Respondent was required to undergo an evaluation by the South Carolina Department of Mental Health (SCDMH).¹

On or about June 5, 2023, Dr. Marie E. Gehle, Psy.D. of SCDMH issued a report from psychological evaluation wherein the doctor opined that Respondent did not meet the legal definition of a sexually violent predator. On July 21, 2023, the State informed Respondent of its intention to exercise its right to obtain a second opinion pursuant to S.C. Code § 44-48-90(c). The State retained the Sexual Behaviors Clinic Community & Public Safety

¹ At the time, Respondent was represented by Attorney James Falk. Kindle K. Johnson has since been appointed to represent Respondent.

Psychiatry Division of the Medical University of South Carolina (MUSC) to provide a second opinion of whether Respondent met the statutory criteria for classification as a Sexually Violent Predator (SVP). Their evaluator, Dr. Emily Gottfried, conducted a precommitment evaluation of Respondent, which included administering a penile plethysmography (PPG) as designed by Limestone Technologies, Inc. The Limestone PPG used two stimulus sets to measure Respondent's physiological responses such as penile circumference, galvanic skin response, respirations, and body movement. The Burke-Musolf/Real Child Voices stimulus set (RCV) depicted consensual and non-consensual sexual activity, as well as neutral (non-sexual) scenarios. The Marshall stimulus set, depicted scenarios of rape of adult women, sexual activity with consenting adult women, and neutral scenarios.²

On June 3, 2024, Dr. Gottfried issued a report pursuant to her evaluation. She alleged that Respondent's PPG results showed arousal during scenarios of rape and sexual violence in the Marshall stimulus set.³ However, the PPG results for Respondent's Real Child Voices set "did not meet minimum requirements for a valid examination so no further analysis was conducted."⁴

Despite the challenges noted during the PPG testing (such as Respondent's difficulty following instructions and respiratory irregularities), Dr. Gottfried opined that Respondent met the diagnostic criteria for sexual sadism disorder (in a controlled environment) and other specified personality disorder with antisocial and psychopathic traits. Dr. Gottfried further opined that Respondent met the criteria for classification as a Sexually Violent Predator.

Respondent now argues that all evidence related to Respondent's PPG should be excluded because the PPG is inherently unreliable and because the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Rules 702 and 403, SCRE; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); and *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010). Respondent requests a pre-trial hearing to determine the admissibility of Dr. Gottfried's testimony as a whole, as well as her testimony regarding Respondent's PPG results.

² See Sexual Behaviors Consultation Evaluation Report of Dr. Emily Gottfried pp. 49-50 (June 3, 2024).
³ Sexual Behaviors Consultation Evaluation Report of Dr. Emily Gottfried p. 50 (June 3, 2024).
⁴ Sexual Behaviors Consultation Evaluation Report of Dr. Emily Gottfried p. 50 (June 3, 2024).

ARGUMENT

3 I. DR. GOTTFRIED'S PPG RELATED TESTIMONY SHOULD BE EXCLUDED FOR BEING UNRELIABLE.

The admission of expert testimony is regulated by Rule 702 of the South Carolina Rules of Evidence (SCRE), which states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." See also, *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Additionally, before expert testimony can be admitted, the trial court must find that (1) the subject matter is beyond the average juror's understanding, necessitating expert explanation; (2) the proposed witness possesses the necessary knowledge and skill to be deemed an expert in the relevant area, and (3) the expert's testimony is reliable. *Id.*

In evaluating reliability, the trial judge should apply the factors established in *State v. Jones*, which include: (1) the publication and peer review of the method, (2) the previous application of the method to similar evidence in prior cases, (3) quality control measures to ensure reliability, and (4) the alignment of the method with established scientific principles and procedures. *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979); *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). The trial judge must further determine that the probative value of the evidence is outweighed by any potential prejudicial impact. SCRE, Rule 403.

Respondent is informed and believes that the PPG (with its associated RCV and Marshall stimulus sets, as used by Dr. Gottfried) has been criticized for its lack of standardization and susceptibility to manipulation. In the most recent and significant case, *In re the Care & Treatment of Daily*, the South Carolina Court of Appeals considered the controversy surrounding the PPG, specifically its lack of standardization and peer-reviewed publications, and concluded that the PPG results were unreliable and therefore inadmissible.⁶ *In re the Care & Treatment of Daily*, No. 6061 (S.C. Ct. App. Jun. 12, 2024). The court noted that the general legal consensus was that the PPG is unreliable and inadmissible. *Daily* at p. 6.

The stimulus sets used in this case were the same controversial ones used in the *Daily* case, but with more inconsistencies. Per Dr. Gottfried's report, the results from Respondent's Real Child Voices stimulus set failed to meet the minimum requirements for interpretation. Little explanation was provided for this failure. Moreover, results from

Respondent's Marshall stimulus set results were rife with irregularities, yet still deemed valid.⁵ Accordingly, given the PPG's lack of reliability, as well as the incongruities associated with Respondent's particular results, testimony regarding Respondent's PPG should be excluded.

II. DR. GOTTFRIED'S PPG RELATED TESTIMONY SHOULD BE EXCLUDED FOR BEING UNFAIRLY PREJUDICIAL.

As set forth in Rule 401 of the South Carolina Rules of Evidence, evidence is relevant if it has, "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, relevant evidence may be excluded, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." SCRE Rule 403. To avoid unfair prejudice, a trial court must balance whether the prejudicial effect of the evidence outweighs its probative value; if so, the evidence should be excluded despite its relevance. *Jamison v. Ford Motor Co.*, 373 S.C. 248 (Ct. App. 2007).

In this case, the use of PPG results carries a significant risk of prejudice, especially given the test's inherent limitations and susceptibility to manipulation. Respondent's nervousness, confusion, and respiratory irregularities increase the likelihood for a misinterpretation of his physiological responses. Because the potential for undue prejudice outweighs any probative value the test results might have, Dr. Gottfried's testimony related to the PPG should be excluded.

III. DR. GOTTFRIED SHOULD BE EXCLUDED FROM TESTIFYING BECAUSE THE PPG WAS USED AS A BASES FOR HER OPINION REGARDING RESPONDENT'S

✓ Dr. Gottfried's opinion that Respondent is a sexually violent predator is heavily based on the PPG results, which as argued above, are unreliable. Expert testimony must be founded on reliable and valid scientific methods. Given the criticisms and lack of standardization of the PPG, Dr. Gottfried's testimony, which rests on these results, should be excluded. In particular, her reliance on the PPG to diagnose Respondent's alleged personality disorder is

⁵ Per Dr. Gottfried's report, Respondent demonstrated nervousness and respiratory irregularities, and failed to follow instructions. Dr. Gottfried suggested that Respondent was intentionally trying to manipulate the test. See Sexual Behaviors Consultation Evaluation Report of Dr. Emily Gottfried pp. 50-52 (June 3, 2024).

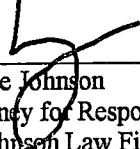
problematic, as the test cannot be trusted as a valid diagnostic tool. Accordingly, Respondent requests that Dr. Gottfried be prohibited from testifying in this case.

CONCLUSION

Based on the unreliable nature of the PPG test results, the prejudicial effect of this evidence, and the questionable foundation upon which Dr. Gottfried based her expert opinion, Respondent respectfully requests that testimony of Dr. Gottfried regarding the PPG be excluded. The PPG is scientifically controversial and subject to manipulation, and its results, particularly in this case, lack the necessary reliability to support an expert opinion. Additionally, the probative value of the PPG evidence is substantially outweighed by the risk of prejudice to Respondent, and its use would likely mislead the jury and result in an unfair trial. Finally, because Dr. Gottfried's opinion is rooted in these unreliable and prejudicial results, her testimony as a whole should be excluded.

For the foregoing reasons, Respondent asks that this Court conduct a hearing to establish the reliability of the anticipated PPG testimony from Dr Emily Gottfried regarding Respondent's PPG test.

RESPECTFULLY SUBMITTED BY



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December 1, 2024
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