

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAY 18 2015
SC Court of Appeals

Appeal from Berkeley County Common Pleas
Markley R Dennis, Circuit Court Judge

In the Matter of the Care and Treatment of Michael Myers

Michael Myers,

APPELLANT

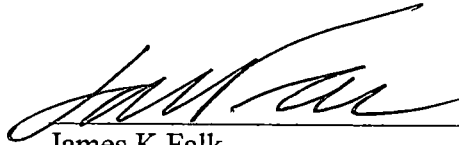
State of South Carolina

RESPONDENT

APPELLATE CASE NO: 2015-000994

MOTION TO WITHDRAW APPEAL WITHOUT PREJUDICE

Appellant, by counsel, moves this to withdraw his appeal without prejudice. As grounds for this motion appellant states that after filing his Notice of Appeal, appellant filed a timely Motion for New Trial in the Berkeley County Court of Common Pleas. Appellant's appeal in this action is therefore premature. Attached hereto as Exhibit A, is a copy of Appellant's Motion for New Trial filed with the Berkeley County Circuit Court.



James K Falk
Attorney for Appellant

Richard Bush♦♦
Bradford C. Andrews
James K. Falk♦
Barbara Pinkerton♦
Benjamin Parker



Bush Law Group, P.C.
Legal, Business, & Financial Consulting

843.300.1047
Facsimile: 843.628.2403
www.bushlaw.com

♦ Managing Attorney
+ M.B.A.
♦ Also Admitted Kentucky
♦ Also Admitted Maryland

May 1, 2015

VIA US MAIL

Berkeley County Clerk of Court
300- B California Avenue
Moncks Corner, SC 29461

**RE: In the Matter of the care and Treatment of Matthew Myers
(2012-CP-08-3391)**

Dear Clerk of Court,

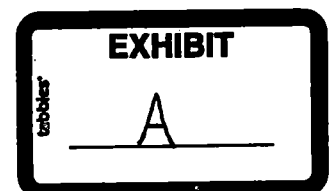
Please find the enclosed Motion Coversheet and Respondent's Motion for New Trial regarding the above referenced cases. Please keep the original and return the copies using the self-addressed stamped envelope. Should you have any additional questions please do not hesitate to contact the office.

Thank you for your assistance.

With best regards, I am,

Tiffany Barba, CP
Paralegal
Bush Law Group, P.C.

cc: Christopher A. Morrow, Esq.
Office of the South Carolina Attorney General
P.O. Box 11549
Columbia, SC 29211



STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)
 IN THE MATTER OF THE CARE AND)
 TREATMENT OF)
 _____)
 Plaintiff,)
 vs.)
)
 MICHAEL MYERS)
 _____)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO.: 2012-CP-08-3391
 MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET

Plaintiff's Attorney: James Falk , Bar No. 80125 Address: 3 Broad Street, Suite 450 Charleston, SC 29401 Phone: 843-300-1047 Fax 843-628-2403 E-mail: jfalk@bushlaw.com Other: _____	Defendant's Attorney: Christopher A. Morrow, Bar No. _____ Address: P.O. Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
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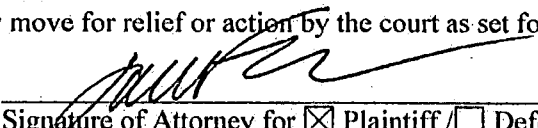
MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____
 Estimated Time Needed: _____ Court Reporter Needed: YES/ NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

05/01/2015
Date submitted

SECTION III: Motion Fee

PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)

- Rule to Show Cause in Child or Spousal Support
- Domestic Abuse or Abuse and Neglect
- Indigent Status State Agency v. Indigent Party
- Sexually Violent Predator Act Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication Motion for Execution (Rule 69, SCRCP)
- Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
--	---------------------------------

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

4. As a result, the presiding judge signed the order committing respondent to the S.C. Department of Mental Health's Sexually Violent Predator Program facility.
5. Prior to trial on or about April 3, 2015 respondent's counsel sent a subpoena to the State's expert Dr. William Burke requiring Dr. Burke to produce the raw data Dr. Burke used in preparing his evaluation of whether respondent met the criteria of a sexually violent predator. The date set for compliance was April 16, 2015. The subpoena was sent to the address provided on Dr. Burke's evaluation. (A copy of the subpoena is attached hereto as exhibit A)
6. On information and belief Dr. Burke was aware of this subpoena, as respondent's counsel had a telephone conversation with petitioner's counsel regarding the matter, and petitioner's counsel reported that he advised Dr. Burke to comply with the subpoena. Moreover during his testimony in the pre-trial *Counsel* hearing conducted April 20, 2015, Dr. Burke acknowledged that he knew about the subpoena, but that the subpoena was not sent to his correct address.
7. On April 17, 2015, respondent's counsel sent an email to Dr. Burke inviting him to email the subpoenaed information to counsel. (attached hereto as exhibit B)
8. On or about April 29, 2015, counsel for respondent received an email from Dr. Marie Gehle (who testified at the commitment trial on behalf of petitioner) advising that she had the opportunity to review Dr. Burke's raw data and it was her opinion that Dr. Burke made a computation error in determining the petitioner's score on the Hare Psychopathy Checklist-Revised (PCL-R) test. Dr. Gehle's affidavit is attached hereto as exhibit C.

9. Counsel is informed and believes that the failure to raise this issue during the trial was either excusable neglect or the result of a deliberate choice made by petitioner and its expert witness.

10. Counsel for petitioner is informed as believed that the computation error was both significant and prejudicial to respondent.

11. Counsel for petitioner maintains that the computation error was significant because Dr. Burke testified at the commitment hearing that petitioner scored a 30 on the PCL-R, and that a 30 was the cut-off number for determining whether the petitioner should be classified as a psychopath. However, Dr. Gehle confirms that petitioner's score under the test was at most a 28, and therefore should not be classified as a psychopath.

12. Counsel for petitioner maintains that Dr. Burke's erroneous testimony that as defined by the PCL-R test, petitioner should be classified as a psychopath was highly prejudicial. Dr. Gehle testified that based upon petitioner's score on the Static-99R petitioner was placed in the high risk category for recidivism. Dr. Burke's testimony agreed with Dr. Gehle's opinion regarding the Static-99R. However, it was Dr. Gehle's opinion that petitioner was not a sexually violent predator because based upon the diagnostic criteria in the DSM-V, petitioner did not suffer from a mental disease or defect. However, Dr. Burke testified that based upon petitioner's results from the PCL-R and the Penile Plethysmograph test (PPG) petitioner suffered from Other Specified Paraphilic Disorder (raptophilia) and Sexual Sadism Disorder. Dr. Burke testified that the PCL-R and the PPG results were two of several "data points" used in reaching his conclusion. Dr. Burke's testimony regarding the PPG and PCL-R tests were the two

most significant points of difference between Dr. Gehle's and Dr. Burke's testimony and opinions. Moreover, counsel is informed and believed that that Dr. Burke's testimony labeling respondent as a psychopath was highly prejudicial and may have played a significant role in the jury's decision to follow Dr. Burke's recommendation as opposed to the recommendation of Dr. Gehle.

13. Respondent's counsel asserts that although this was a civil commitment hearing and not a criminal trial, the result of the hearing had a substantial impact on respondent's liberty interests and therefore effects his rights under the 5th and 14th Amendments to the United States Constitution as well as Article 1 Section 3 of the South Carolina Constitution.

Wherefore counsel requests that:

- A. Respondent be transported back to the Berkeley County Detention Center.
- B. That Respondent be granted a new trial at the first possible term of court in Berkeley County Common Pleas.
- C. Respondent be granted all other further relief to which he may appear entitled.

Respectfully Submitted,



James K Falk
Bush Law Group
3 Broad Street, Suite 450
Charleston, SC 29401
(843) 300 1047
jfalk@bushlaw.com

Charleston SC
May 1, 2015

CERTIFICATE OF SERVICE

Undersigned certifies that a copy of this Motion was deposited in the United States Post Office, sufficient first class postage affixed, and mailed to petitioner's counsel at the above address May 1, 2015



James K Falk

Richard Bush♦♦
Bradford C. Andrews
James K. Falk♦
Barbara Pinkerton♦
Benjamin Parker

♦Managing Attorney
+ M.B.A.
♦Also Admitted Kentucky
♦Also Admitted Maryland



Bush Law Group, P.C.
Legal, Business, & Financial Consulting

843.300.1047
Facsimile: 843.628.2403
www.bushlawsc.com

April 3, 2015

VIA US MAIL

Dr. William Burke, Ph.D., LPC
MUSC
Department of Psychiatry and Behavioral Sciences
29C Leinbach Drive
Charleston, SC 29407

RE: In Re Care and Treatment of Michael Myers (2012-CP-08-3391)

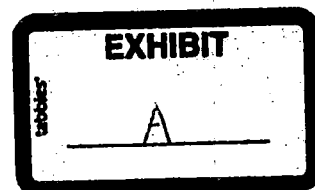
Dr. Burke,

I have enclosed a subpoena regarding the above referenced case. Should you have any questions please do not hesitate to contact the office.

Thank you for your assistance.

With best regards, I am,

Tiffany Barba, CP
Paralegal
Bush Law Group, P.C.



STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF BERKELEY

SOUTH CAROLINA, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

MICHAEL MYERS, Defendant

Case Number: 2012-CP-08-3391

Pending in BERKELEY County

TO: William Burke, PhD

YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM
---------------------	--------------------

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

Described in attachment 1

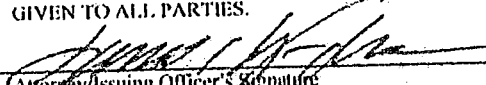
PLACE Bush Law Group, 3 Broad Street, Suite 450 Charleston, SC 29401	DATE AND TIME April, 16 2015 , 9:00 AM
--	--

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM
----------	--------------------

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

 _____
 Attorney/Issuing Officer's Signature Date Print Name
 April 3, 2015 James K Falk
 Indicate if Attorney for Plaintiff or Defendant
 Attorney's Address and Telephone Number:
 3 Broad Street, Suite 450, Charleston, SC 29401. (843) 300-1047 jfalk@bushlaw.com

 Clerk of Court/Issuing Officer's Signature Date Print Name
 Pro Se Litigant's Name, Address and Telephone Number:

PROOF OF SERVICE

SERVED	DATE <u>04/03/2015</u>	FEES AND MILEAGE TENDERED TO WITNESS <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO AMOUNT \$
	PLACE <u>29C Leinbach Dr. Charleston SC, 29407</u>	
SERVED ON	<u>William Burke, Ph.D., LPC</u>	MANNER OF SERVICE <u>U.S. Mail</u>
SERVED BY	<u>Tiffany Barba</u>	TITLE <u>Paralegal</u>

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 04/03/2015

Tiffany Barba
SIGNATURE OF SERVER
3 Broad Street Suite 450, Charleston, SC 29401
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BERKELEY)	FOR THE NINTH JUDICIAL CIRCUIT
)	
In Re Care Treatment)	CASE NO.: 2012-CP-08-3391
)	
of)	
)	
Michael Myers)	
)	
Defendant,)	
_____)	

ATTACHMENT 1 to WILLIAM BURKE PhD SUBPOENA

The named individual is to produce the following:

1. Copies of all raw data collected and any notes prepared by Dr. Burke in connection with the following Assessment Instruments & Objective Measures: Static 99RR, Static 99, Static 99R, Stable 2007, Acute 2007, Hare Psychopathy Checklist-Revised, Limestone Prefest Penile Plethysmograph, Mini Mental State Evaluation (MMSE), Personality Assessment Inventory (PAI), Conner's Continuous Performance Test II, Substance Abuse Screening Inventory (SASSI), Abel Assessment for Sexual InterestII. (AASI)
2. In addition to the above and with specific regard to the Limestone Prefest Penile Plethysmograph testing:
 - a. Computer-generated copies of all reports, testing logs, maintenance logs, records, computer data, or other memoranda, of testing performed through use of the PPG equipment including the Stingray Pneumatic Pad used to test Respondent Michael Myers herein beginning 30 days before date the Respondent was tested and 14 days after said date.
 - b. A copy of the PPG Technician's notes regarding the testing of Michael Myers and referred to in Dr. Burke's SBCL Sexual Behaviors Consolation Evaluation Report, as well as a copy of the PPG technician's CV, and training manual, and or any certifications or licenses obtained regarding the use of this equipment.
 - c. Copies of all test results substantiating the reliability and validity of the stimulus materials utilized with this examination including without limitation the Real Child Voices Stimulus Set.

d. Copies of all peer reviewed studies conducted for the purpose of verifying the theory underlying the Real Child Voice Stimulus Set.

3. In addition to the above and with regard to the AASI:

a. Copies of all documents, tests, and or questionnaires prepared either by or on behalf Michael Myers that were submitted to Abel Screening Inc., it affiliates or agents. for evaluation; and copies of all graphs, printouts and reports prepared by Abel Screening Inc. regarding Michael Myers.

James Falk

From: jfalk@bushlaw.com
Sent: Friday, April 17, 2015 2:09 PM
To: burkewh@musc.edu
Subject: Michael Myers

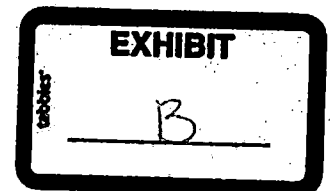
Dr Burke

Can you email me the information I requested by subpoena? Thank you for your cooperation.

Regards

James Falk

Sent from my iPhone
James Falk
Bush Law Group
3 Broad St
Suite 450
(843) 300 1047
Jfalk@bushlaw.com



STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BERKELEY)	FOR THE NINTH JUDICIAL CIRCUIT
)	
State of South Carolina)	CASE NO.: 2012-CP-08-3391
)	
Petitioner,)	
)	
vs.)	
)	
Michael Myers)	
)	
Respondent,)	

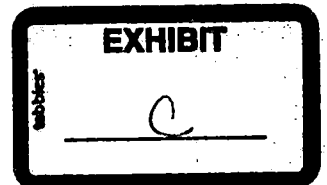
Affidavit of Dr. Marie Gehle

Affiant after being duly sworn hereby deposes and states that:

1. I was qualified as an expert witness in the sexually violent predator commitment trial of Michael Myers. The Court qualified me as an expert in the fields of Forensic Psychology and Sexually Violent Predator Commitment actions.


2. Dr. William Burke testified on behalf of the state. Dr. Burke testified that one of the tests he performed on the respondent was the Hare Psychopathy Checklist-Revised (PCL-R). In his report Dr. Burke stated that respondent's score on the test was 30. Dr. Burke stated further that a score of 30 is the clinical cut-off score which indicates the presence of psychopathy and petitioner was in the 89.3rd percentile, indicating that petitioner scored higher than 89.3 percent of the male inmates on whom this instrument was normed.

3. Dr. Burke's raw test data was not available prior to trial. It was provided to me on the day of the trial at which time I did not have an opportunity to thoroughly review and consider it. I have since had the opportunity to review the raw data Dr. Burke used to derive the respondent's score on the PCL-R test. I have reviewed Dr. Burke's hand written scoring sheet and calculated the results based upon the values Dr. Burke assigned and found that petitioner scored a 28 and not a 30. Under the facts in petitioner's case, the 2 point discrepancy in Dr. Burke's actual and reported PCL-R scores is highly significant because a score



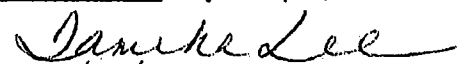
of 28 places petitioner under the cut-off score for determining the presence of psychopathy. I recognize that many of the values assigned to each of the criteria used as part of the PCL-R are subjective, and it is my professional opinion that petitioner's score should be even lower than a 28.

Further the affiant sayeth naught!


Marie E. Gehle Psy.D.

Subscribed and sworn to me this

30th day of April, 2015


3/6/17
Notary Public

My Commission Expires:

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAY 18 2015

SC Court of Appeals

Appeal from Berkeley County Common Pleas
Markley R Dennis, Circuit Court Judge

In the Matter of the Care and Treatment of Michael Myers

Michael Myers,

APPELLANT

State of South Carolina

RESPONDENT

APPELLATE CASE NO: 2015-000994

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's Motion to Dismiss Appeal Without Prejudice has been served upon Alan M. Wilson, Esquire, P.O Box 11549, Columbia, SC 29211, The Honorable Markley R. Dennis, at PO Box 1800 Moncks Corner, S.C. 29461, and Mary P. Brown, Berkeley County Clerk of Court, at PO Box 219, Moncks Corner, SC 29461-0219 this 14 day of May, 2015 by depositing the same with the United States Post Office sufficient first class postage affixed


James K Falk
Attorney for Appellant



Richard Bush ♦♦
Bradford C. Andrews
James K. Falk ♦
Barbara Pinkerton ♦
Benjamin Parker

jfalk@bushlaw.com
843.300.1047, ext. 104
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♦ Managing Attorney
♦ M.B.A.
♦ Also Admitted Kentucky
♦ Also Admitted Maryland

May 14, 2015

VIA US MAIL

Clerk of Courts
South Carolina Court of Appeals
1015 Sumter St
Columbia, SC 29201

RECEIVED

MAY 18 2015

SC Court of Appeals

Re: The Matter of the Care and Treatment of Michael Myers

Dear Madam Clerk:

I have enclosed a copy of the Motion to Withdraw Appeal Without Prejudice and Certificate of Service in the above styled case along with my proof of service. I have enclosed a duplicate copy of the notice of appeal. Please return a stamped copy of the Notice in the enclosed SASE.

Thank you for your assistance.

With best regards, I am,

Tiffany Barba, CP
Paralegal
Bush Law Group, P.C.

Enclosures

cc: Alan M. Wilson, Esq.
Honorable Markley R. Dennis
Mary P. Brown



BUSH LAW GROUP, P.C.
3 Broad Street, Suite 450
Charleston, SC 29401
Attn: Jim Falk



RECEIVED
MAY 18 2015
SC Court of Appeals

Clerk of Courts
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201