STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
The Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2015-002241

IN THE MATTER OF THE CARE AND TREATMENT OF
TIMOTHY GROVES OXENDINE,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

If the Court considers Appellant's ineffective assistance of counsel allegation on direct appeal, counsel was not ineffective in failing to object to evidence regarding the penile plethysmograph because it is accepted as evidence in numerous juridictions, and the primary reference book for the mental health community recognizes it as a legitimate evaluation tool.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Prior to Appellant's release from prison, Respondent State of South Carolina ("the State") filed a Petition Pursuant to the Sexually Violent Predator Act (the "SVPA"), seeking Appellant's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on September 28, 2015, before the Honorable R. Scott Sprouse, Circuit Court Judge.

The State presented Dr. William Burke, Ph.D, who was qualified, without objection, as an expert in the assessment and evaluation of sex offenders pursuant to the Sexually Violent Predator Act (Trial Testimony [TT], pp. 34-37; Record on Appeal [R.], pp. 34-37). He stated he had testified as an expert witness in the assessment of sex offenders approximately fifteen to twenty times in sexually violent predator cases, and this was the fifth time he had testified on behalf of the State. In addition, he stated he had testified in front of the state senate about revamping the sexually violent predator law in South Carolina. (TT, p. 36; R., p. 36).

Dr. Burke outlined the protocol he follows in pre-commitment evaluations, which includes extensive review of relevant documents and an interview with the client. He testified he uses actuarial instruments and conducts standard psychological tests to determine if the offender has certain risk factors that will make him likely to reoffend, and whether the offender has any mental disorder that may be a causal factor for his behavior. (TT, pp. 38-39; R., pp. 38-39).

Dr. Burke also utilizes objective testing, which is based on the client's reactions rather than the opinion of the doctor conducting the test. Dr. Burke stated he uses the penile plethysmograph (PPG) to collect this objective data. He stated the PPG is the only objective

testing instrument that is approved by the Food and Drug Administration for measuring sexual arousal.1 (TT, p. 39; R., p. 39).

Dr. Burke then outlined the PPG protocol he follows, which was developed by the Association for the Treatment of Sexual Abusers (ATSA). The individual is placed in a room by himself, so the staff never sees him disrobe, and he attaches the measuring instrument to his own penis. The individual is given video instructions, and then shown twenty-seven three minute images of different types of sexual behavior. Some images depict appropriate behavior, while other images show inappropriate behavior. The instrument measures the blood flow to the individual's penis to detect levels of sexual arousal. (TT, pp. 39-40; R., pp. 39-40).

Dr. Burke testified he also interviewed Appellant for two hours and forty minutes as part of his evaluation. He and two other people explained the purpose of the evaluation to Appellant, and Appellant consented to the interview. (TT, p. 41; R., p. 41) Dr. Burke also relied on documentation regarding Appellant's criminal history, and testified this was the type of information typically relied on by experts in his field, because a person's past behavior, sexual or nonsexual, is the best predictor for future behavior. (TT, pp. 41-44; R., pp. 41-44).

Dr. Burke described Appellant's sexual offenses and the charges associated with those offenses. As to Appellant's 2005 conviction for lewd act upon a minor; Appellant touched and fondled the vaginal area of an eleven year old girl with his hand. Dr. Burke also described Appellant's conviction for three counts of criminal sexual conduct with a minor in the second degree, involving a fourteen year old child. These convictions arose from the child performing fellatio on Appellant a number of times, Appellant having vaginal intercourse numerous times

[1] *See* www.accessdata.fda.gov/cdrh_docs/pdf5/k052929.pdf (510(k) Summary - FDA pre-marketing approval for Limestone Technologies, Inc. PrefTest Professional Suite [Penile Plethysmograph]).

with the victim over the course of a year, and Appellant performing oral sex on the victim. Appellant was also convicted of criminal sexual conduct with a minor in the second degree for having sexual intercourse with the victim when she was approximately twelve years old. (TT, pp. 44-47; R., pp. 44-47).

In assessing Appellant's risk to reoffend, Dr. Burke also considered Appellant's behaviors that did not result in charges or convictions, testifying he relied on legal documents relating to Appellant's nonsexual offenses as part of his evaluation. In one instance, Appellant was originally charged with lewd act upon a minor involving a six year old child, but the charge was amended as part of a plea deal. Appellant was also charged with assault and battery of a high an aggravated nature, which was subsequently *nolle prossed* as part of the plea agreement. (TT, pp. 47-50; R., pp. 47-50).

Dr. Burke described the specific tests he performed on Appellant as part of his evaluation, including the Connors Continuous Performance Test (CCPT), which is a computer based test to ascertain if the individual may have attention deficit hyperactivity disorder (ADHD) and/or possible brain damage. A diagnosis of ADHD may indicate impulsiveness, and brain damage may also be a risk factor for sexual behavior. Dr. Burke testified the test he ran on Appellant indicated Appellant did not have a diagnosis of ADHD, nor did he show signs of brain damage. (TT, p. 51; R., p. 51).

Dr. Burke also completed a Static-99R risk assessment, which is an actuarial tool used to assess the person's risk of committing another sex crime over a five to ten year period after release. Dr. Burke stated he had some reservations regarding the Static-99R because it has changed significantly over the years, but it still gives a good indication of an individual's risk to

reoffend. Appellant's score of seven placed him in the high risk to reoffend category. (TT, p. 52; R., p. 52).

Dr. Burke also utilized the Stable-2000 test, which is used to predict a person's risk of re-offense over a one year period after release. He stated the Stable-2000 test predicted Appellant had a moderate risk to reoffend in his first year after reentering in the community. Dr. Burke stated some of factors which elevated Appellant's risk included his child victims and a sexual preference toward children. (TT, pp. 52-53; R., pp. 52-53).

Dr. Burke also used the Abel Assessment for Sexual Interest. During the test, during which the person is shown 340 pictures of men, women, and children, and his viewing time is measured and calculated to determine his sexual interest. As part of the Able Assessment, the Emerick sexual victimization scales are also utilized to quantify the significance of the individual's own sexual victimization to his risk to reoffend. Appellant was abused as a child by an older female, but Dr. Burke concluded Appellant did not show any indication of traumatic, intrusive thoughts, or symptoms of trauma related to the abuse. (TT, pp. 53-54; R., pp. 53-54).

Dr. Burke also performed a mental status exam on to determine Appellant's ability to understand and follow instructions, demonstrate a working memory, consciousness, involvement in the conversation, and understanding of what is occurring. Appellant scored twenty-six out of a possible score of thirty. (TT, pp. 54-55; R., pp. 54-55).

Dr. Burke used an additional actuarial scale, called the Hare Psychopathy Checklist, to determine whether Appellant met the criteria to be diagnosed as a psychopath, and concluded Appellant did not meet the diagnostic criteria for psychopathy. Dr. Burke also conducted a personality assessment inventory, which indicated Appellant was an individual with alcohol or substance abuse issues, and a possible personality disorder with anti-social features.

Dr. Burke testified Appellant's PPG results indicated Appellant responded significantly to prepubescent and adolescent females, and did not respond to any adult scenario. He stated the information gathered from these assessments was used as part of the basis of his ultimate opinion. (TT, pp. 55-57; R., pp. 55-57).

Dr. Burke explained risk factors are used to predict whether someone is going to reoffend sexually in the future, and testified Appellant possessed several risk factors, including a diagnosis of pedophilic disorder, which meant Appellant had acted on his chronic sexual arousal to children. Dr. Burke also pointed out Appellant's intervening sixtieth birthday lowered his Static-99R score from seven to four, but he did not feel the lower score accurately reflected Appellant's level of risk because of his extensive criminal sexual history. (TT, pp. 58-61; R., pp. 58-61).

Dr. Burke diagnosed Appellant with pedophilic disorder, and testified pedophilic disorder is considered a relevant mental abnormality among experts who conduct sexually violent predator evaluations. He identified pedophilic disorder as a chronic condition that cannot be cured, and stated Appellant's participation in the C-Star sex offender program in prison was not adequate standard of care for the treatment of sex offenders. (TT, pp. 61-62; R.; pp. 61-62).

Dr. Burke testified to a reasonable degree of professional certainty Appellant's pedophilic disorder affected his ability to control his dangerous propensities such that he is disposed to commit future acts of sexual violence. He further testified to a reasonable degree of psychological certainty Appellant met the statutory criteria of a sexually violent predator, and as a result of his pedophilic disorder, Appellant was likely to engage in acts of sexual violence if not confined to a secured facility for long-term control, care and treatment. (TT, pp. 62-64; R., pp. 62-64).

On cross-examination, Dr. Burke testified he was a developer of the Limestone Sex Offender Certification Program. He and several forensic psychiatrists around the country worked together to develop a protocol for teaching qualified clinicians to administer and interpret the PPG system. The clinicians he trains must have at least a master's degree in behavioral science, and be appropriately licensed in their states. He stated he trains five to eight people a year, and there are only 220 people who are qualified teach the PPG protocol. Dr. Burke also testified he co-developed the real child voice stimulus set, which is the only PPG stimulus set that utilizes real child voices. (TT, pp. 69-71; R., pp. 69-71).

Dr. Burke elaborated on the protocol he uses for administering the PPG. He testified he always gives the PPG test twice, which takes approximately four hours. No child pornography is ever shown, the individual is not asked to masturbate, and the administrators do not touch the individual at all. The individual watches an instructional video, and then puts the gauge on himself. (TT, pp. 77-79; R., pp. 77-79).

Dr. Burke reiterated his opinion Appellant has a greater than fifty percent chance of reoffending sexually. He further clarified his reservations with the Static-99R test. He testified he felt the Static-99R provided a good thumbnail sketch of an offender that can be used as a baseline for diagnosis. He stated while it is not a perfect test, the results from a Static-99R tool is an important data point to be considered as part of an evaluation. (TT, pp. 71-77; R., pp. 71-77).

On re-direct, Dr. Burke testified he was familiar with the Diagnostic and Statistical Manual for Psychiatric Diagnoses, Fifth Edition (DSM-5). He testified the DSM-5 is used by clinicians in the mental health field for diagnosis and treatment, and it specifically mentions the PPG as the proper test to use when assessing sex offenders. On re-cross, Dr. Burke testified the PPG is used for both treatment and determining recidivism. (TT, pp. 82-83; R., pp. 82-83).

The circuit court denied Appellant's motion for directed verdict, finding the State met its burden in presenting evidence upon which the jury could determine Appellant to be a sexually violent predator. (TT, pp. 84-85; R. pp. 84-85). Appellant then testified on his own behalf, and presented expert testimony.

Appellant testified regarding his incarceration and his plans if released. He stated he participated in many programs while incarcerated, and worked to save up money for his release. He further testified he will be required to attend sex offender treatment for a period of a year and a half to two years upon release from prison as part of his sex offender registration. He gave testimony regarding his plans to attend treatment through the Mental Health Department. (TT, pp. 87-92; (R. pp. 87-92)

Appellant presented Dr. Marie E. Gehle, Psy.D., who was qualified, without objection, as an expert in forensic psychology. Dr. Gehle outlined the protocol she follows in pre-commitment evaluations, which included reviewing all available documents, and interviewing Appellant. (TT, pp. 93-100; R., pp. 93-100).

Dr. Gehle also completed a Static-99R risk assessment. Dr. Gehle explained the Static-99R is an actuarial measure used to measure a person's risk of sexual recidivism. Appellant initially scored four, but his sixtieth birthday reduced his score to two. She testified a score of two is equivalent to that of an average sex offender (TT, pp. 102; R. p. 102)

Dr. Gehle also diagnosed Appellant with pedophilic disorder. She testified she reviewed Appellant's South Carolina Department of Corrections (SCDOC) records, and Appellant had no disciplinary infractions while incarcerated. Additionally, the records stated Appellant finished the prison sex offender treatment program with excellent participation. Dr. Gehle then opined the

Appellant did not meet the criteria for being a sexually violent predator. (TT, pp. 104-106; R. pp. 104-106).

On cross-examination, Dr. Gehle acknowledged Appellant had been convicted of six previous sexual offenses. Appellant was convicted of lewd act upon a minor under 14 in 1995, for which he was sentenced to ten years suspended to three years incarceration and three years probation. Appellant committed the next five sexual offenses after he completed sex offender treatment in 1996.

Dr. Gehle testified Appellant told her during the interview he believes he no longer needs sex offender treatment. She also testified appellant suffers from pedophilic disorder which is a chronic condition, meaning it cannot be cured, and Appellant suffers from several empirically reported, psychologically meaningful, risk factors beyond those covered by the Static-99R. Those risk factors include a history of sexual preoccupation and a history of emotional congruence with children. (TT, pp. 109-110; R. pp. 109-110).

The court denied Appellant's renewed directed verdict motion at the close of the evidence. (TT, pp. 114; R. pp. 114). The jury found beyond a reasonable doubt Appellant is a sexually violent predator, and the circuit court committed him to the South Carolina Department of Mental Health for long term control, care and treatment. (TT, pp. 141, Order of Commitment; R. pp. 141, 234). This appeal followed:

ARGUMENT

Appellant contends trial counsel was ineffective as a matter of law, and the alleged ineffectiveness should be determined in this direct appeal because the SVPA does not provide a mechanism to raise ineffective assistance of counsel issues, and he has no other available mechanism to raise the issues. He asks this Court to ignore long standing issue preservation precedent, and essentially apply a plain error standard of review to decide the issues anyway, all without affording trial counsel an opportunity to be heard. Further, contrary to Appellant's contention, there **is** a well-established and available mechanism for him to raise ineffective assistance of counsel issues arising from a sexually violent predator case.

A. Effective Assistance of Counsel in SVPA Cases

Appellant argues he has a due process right to effective assistance of counsel in SVPA cases under the federal and state constitutions. The South Carolina Supreme Court Court has already determined a person the State seeks to commit under the SVPA has no Sixth or Fourteenth Amendment right to counsel, but does have a statutory right to counsel under S.C. Code Ann. § 44-48-90 (2003). In re McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 59 (2004)[2]; *see also* In re McCracken, 346 S.C. 87, 551 S.E.2d 235, 240 (2001) (the only right to counsel under the SVPA is the statutory right to the assistance of appointed counsel).

The primary issue, therefore, is whether the statutory right under the SVPA encompasses the right to "effective" assistance of counsel. The statute does not afford that right, normally arising from the Sixth, Fifth and Fourteenth Amendments, which do not apply to civil cases

[2]Even though the Court specifically cites the Fourteenth Amendment in the McCoy opinion, by way of footnote, Appellant asserts the Fourteenth Amendment reference was dicta, and the constitutional issue was not before the Court. To the contrary, rather than mere dicta, the constitutional references in McCoy were central to the Court's adoption of a meritless appeal procedure in SVPA cases.

under the SVPA. In essence, Appellant is attempting to put a square peg in a round hole, and asks this Court to juxtapose post-conviction relief (PCR) rights and procedures on SVPA proceedings, minus the inconvenience of developing and providing a record for meaningful appellate review.

If this Court holds the statutory right to counsel under the SVPA includes the right to effective assistance of counsel, however, the remaining issues are how such claims should be litigated, and what standard should be used to determine whether counsel was ineffective. Rather than force the square peg into a round hole, there is already a round hole available to Appellant, even though it may be inconvenient for him to use it.

B. Availability of Relief

Appellant contends he has no avenue other than direct appeal to raise ineffective assistance of counsel allegations. On the contrary, if such a right exists, the common law habeas corpus petition provides an adequate, and more appropriate, forum for litigating such allegations.

The South Carolina Constitution provides the "privilege of the writ of habeas corpus shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it." S.C. Const., Art. 1, §18. Habeas corpus **is** available when other remedies, such as PCR, are inadequate or unavailable. Hamm v. State, 403 S.C. 461, 744 S.E.2d 503, 504 (2013); *see also* Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600, 602 (2008) ("a writ of habeas corpus is reserved for the very gravest of constitutional violations which, in the setting, constitute a denial of fundamental fairness shocking to the universal sense of justice"); McWee v. State, 357 S.C. 403, 593 S.E.2d 456, 457 (2004) (habeas relief will only be granted under "unique and compelling circumstances"); Butler v. State, 302 S.C. 466, 397 S.E.2d 87, 88 (1990) ("[N]ot every intervening decision, nor every constitutional error at trial will justify issuance of

the writ.") (internal quotations and citations omitted). The PCR statute superseded habeas corpus for post-conviction relief, but the common law privilege still exists, and Appellant cites no cases to the contrary. As noted above, the SVPA does not provide a process for litigating ineffective assistance of appointed counsel, and therefore, if the Court holds the SVPA statutory right to counsel includes effective assistance of counsel, habeas corpus is available to address those issues.

In Hamm, a SVPTP resident filed a habeas petition in the South Carolina Supreme Court seeking release from his civil commitment under the SVPA, alleging counsel in his criminal case was ineffective under Padilla v. Kentucky, 559 U.S. 356 (2010, by failing to advise him of the SVPA implications before he pled guilty to the predicate SVPA offense.[3] The Court denied the petition, finding the resident failed to file a timely PCR petition on the issue, and therefore, failed to exhaust all available remedies before seeking habeas relief. Hamm at 504.

Significantly, the Court did **not** hold habeas relief was never available to a SVPTP resident, and as discussed above, precluding habeas relief would be contrary to the state constitution. To the contrary, the Court explicitly recognized a SVPTP resident's right to file a habeas petition when appropriate. In re: McCracken, 346 S.C. 7, 551 S.E.2d 235, 238 (2001) (SVPTP resident's remedy for unconstitutional confinement under the SVPA would be by writ of habeas corpus).[4] *See also* Douglas v. Hall, 229 S.C. 550, 93 S.E.2d 891, 894 (1956) (writ of habeas corpus always available to test the legality of proceedings in which person was civilly committed on grounds of insanity).

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[3]In fact, multiple SVPTP residents have filed habeas petitions in the circuit court.

[4]Appellant's assertion the habeas right referenced in McCracken is "limited to challenging the conditions of their confinement" is simply incorrect. Nothing in the Court's opinion imposes such a limitation.

Requiring a petition for habeas relief to assert ineffective assistance of counsel allegations in SVPA cases avoids the problem of trying to decide such claims on the record in a direct appeal, a problem readily apparent in this case. A habeas proceeding would include an evidentiary hearing similar to PCR hearings, which waives attorney/client issues and affords trial counsel the opportunity to address the ineffective assistance of counsel allegations. The hearing will then provide the appellate courts a full record, including the circuit court's findings and conclusions, for review purposes. Absent a full record, the appellate courts: 1) will not have the benefit of trial counsel's input, and have to assume counsel had no legitimate, strategic reasons for proceeding in a particular way; 2) engage in rank speculation based on appellate counsel's assertions regarding what trial counsel should, or should not, have done; 3) ignore issue preservation rules; and 4) apply the plain error standard of review consistently rejected in South Carolina.

In Manning v. State, 913 So.2d 37 (1st Dist Fla. Ct. App., 2005), the court determined habeas corpus, rather than direct appeal, was the appropriate avenue to develop and decide a committee's ineffective assistance of counsel claims in cases under Florida's sexually violent predator statute, even though a habeas proceeding might not be the most convenient process. Subsequent to the Manning case, the Florida Supreme Court promulgated Rule 4.460, Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators, which expressly provides habeas corpus is an available mechanism to raise ineffective assistance of counsel claims in sexual predator cases. Bohner v. State, 157 So.3d 526, 527 (1st Dist. Fla. Ct. App. 2015).

Admittedly, as Appellant notes, some courts have decided ineffective assistance claims on direct appeal in sexual predator cases when the claims did not require development of facts,

which is not the case currently before this Court. As discussed below, however, Appellant's conclusory deficiency allegation requires development of facts before a court can render a truly informed decision on whether trial counsel was so ineffective it shocked the conscious, and Appellant was prejudiced to the point he did not receive a fair trial.

If the Court finds the SVPA statutory right to counsel includes the right to effective assistance of counsel, the State submits the standard for habeas corpus relief is appropriate for ineffective assistance of counsel claims in SVPA cases. The standard established in Strickland v. Washington, 466 U.S. 668 (1984), can then provide a framework for determining whether counsel's performance was so deficient it was shocking to the conscious and undermined the fundamental fairness of the SVPA proceeding.

Apparently recognizing the significant evidentiary problems with his position, Appellant alternatively seeks remand to the circuit court for a hearing and findings. South Carolina appellate courts unquestionably have discretion to remand any case to the trial court for further proceedings, but there is no established precedent in South Carolina providing for remand **only** to develop issues raised for the first time on direct appeal when the party has another available avenue, such as habeas corpus, to raise those issues. Remanding under the circumstances of this case essentially eviscerates issue preservation, and creates a dangerous precedent.

Appellant has an available procedure to raise ineffective assistance of counsel claims, if such a right exists, which will result in development of a full record for appellate review, and he should not be able to circumvent well established issue preservation rules by raising his claims in this direct appeal. While remand may be possible, remanding this case will set a precedent for similar claims in virtually all SVPA proceedings, and any other proceeding in which habeas relief is available but inconvenient. Therefore, even if the Court finds a right to effective

assistance of counsel exists in SVPA cases, the Court should find Appellant's claim is not preserved for direct review, and affirm Appellant's commitment as a sexually violent predator.[5]

C. Specific Ineffective Assistance Allegation

Assuming there is a right to effective assistance of counsel under the SVPA statutory right to counsel, Appellant contends trial counsel's purported performance deficiency is sufficiently demonstrated by the record for this Court to rule on his ineffective assistance allegation -- failure to object to the PPG evidence -- without further information. To the contrary, in the event the Court considers Appellant's ineffective assistance claim in this direct appeal, it is premised on speculation without benefit of trial counsel's input, and with no regard for counsel's possible strategic decisions. In Strickland, the U.S. Supreme Court acknowledged the importance of considering trial counsel's strategy during trial:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

466 U.S. at 690-91.

Further, in order to respond to specific ineffective assistance allegations without counsel's input, which is still protected by the attorney/client privilege, the State must speculate

[5]Appellant correctly notes the issues of whether ineffective assistance of counsel claims are viable under the SVPA, and if so, when and how to raise them, are currently pending before the South Carolina Supreme Court. In The Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellate Case No. 2014-001181 (heard May 17, 2016).

regarding counsel's strategic decisions at trial. With that limitation in mind, the State submits Appellant's allegation is meritless.

Appellant asserts trial counsel was ineffective by failing to object to Dr. Burke's testimony regarding the PPG, claimingthe PPG, like a polygraph test, is unreliable and unscientific. However, contrary to Appellant's reliance on outdated case law and law review articles, courts now predominantly hold evidence related to the PPG **is** admissible at trial in a sexually violent predator case.

There are no South Carolina appellate court cases directly addressing the admissibility of testimony regarding the PPG. The South Carolina Supreme Court and this Court of Appeals, however, have both referenced testimony regarding PPG results in analyzing the sufficiency of evidence to support the verdicts in SVPA cases. *See* In re Care & Treatment of Tucker, 353 S.C. 466, 578 S.E.2d 719, 721 (2003) ("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. The PPG suggested female and male preschoolers (ages two to four years) aroused appellant."); In re the Care and Treatment of Kennedy, 353 S.C. 394, 578 S.E.2d 27, 38 (Ct. App. 2003) (In support of his argument, Kennedy asserts that because he passed the Penile Plethysmography (PPG) test, which is used to test sexual arousal to children, this was the best evidence that he would not re-offend.").[6] In addition, recent case law, reference books and treatises, indicate the PPG now has significant support in the mental health field.[7]

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[6]In a currently pending SVPA case, the circuit court found the PPG is recognized in the relevant field, and evidence regarding it is admissible as evidence at trial under State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979), and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), which established a test for admissibility less stringent than the federal Frye test.

[7]Like virtually all areas of expertise, mental health experts' disagreement regarding the validity of particular tests/tools used by a significant number of practitioners to diagnose and/or treat mental health issues goes to the evidences weight rather than its admissibility.

Of particular note, the DSM-V, sometimes called "the Bible" for mental health professionals, provides:

> The most widely applicable framework for assessing the strength of a paraphilia itself is one in which examinees' paraphilic sexual fantasies, urges, or behaviors are evaluated in relation to their normophilic sexual interest and behaviors. In a clinical interview or on self-administered questionnaires, examinees can be asked whether the paraphilic sexual fantasies, urges, or behaviors are weaker than, approximately equal to, or stronger than their normphilic sexual interests and behaviors. The same type of comparison **can be, and usually is,** employed **in psychophysiological measures of sexual interest, such as penile plethysmograpy** in males or viewing time in males and females.

DSM-V, 686 (emphasis added). It further provides:

> **Psychophysiological measures of sexual interest may sometimes be useful when an individual's history suggest the possible presence of pedophilic disorder but the individual denies strong or preferential attraction to children. The most thoroughly researched and longest used of such measures is penile plethysomograph, although sensitivity and specificity of diagnosis may vary from one site to another.**

Id. at 699 (emphasis added). Thus, the most widely recognized reference book in the mental health field acknowledges the PPG is a valid tool used by the mental health community to provide data particularly relevant in determining a person's risk to reoffend. *See also* Dean Tong, The Penile Plethysmograph, Abel Assessment for Sexual Interest, and MSI-II: Are They Speaking the Same Language?, 35 Am. J. of Fam. Therapy, 187, 190 (2007) ("The PPG, when administered properly, represents a direct and objective measurement of a man's level of sexual arousal to normal versus sexualized stimuli. Since there is a strong relationship between an individual's pattern of sexual arousal and the probability that he may or will act upon that arousal, an important first step in gauging one's propensity to sexual deviancy is to obtain an accurate assessment of that person's sexual arousal patterns, which is precisely what the PPG does."); James M. Peters, Assessment and Treatment of Sex Offenders: What Attorneys Need to

Know, Advocate, Dec. 1999, at 23 (1999) (PPG "is invaluable in the evaluation, treatment and management of known sexual offenders.").

The Second District Appellate Court of Illinois addressed the admissibility of PPG evidence in Illinois sexual predator cases, finding "a significant subset of experts considers PPG testing a useful tool for treating and evaluating sex offenders." In re Commitment of Sandry, 367 Ill.App.3d 949, 857 N.E.2d 295, 309 (Ill.App.Ct, 2nd Dist., 2006). The court noted case law in at least twenty-one states mentioned the use of PPG testing, and academic literature revealed a substantial number of experts consider the PPG useful for dealing with sex offenders. *Id.* at 310-316. *See also* State v. Fullwood, 22 So.3d 655 (Fla.Ct.App., 3rd Dist. 2009) (PPG evidence was properly admitted at trial without a Frye hearing because the test is not new and novel science, and Frye hearing not required); In re Detention of Halgren, 124 Wash.App. 206, 98 P.3d 1206, 1213-1215 (2004) (same).

In short, contrary to Appellant's assertion trial counsel was ineffective because the PPG evidence was absolutely inadmissible, it is likely the PPG evidence would have been admitted in this case, even if trial counsel had objected. Dr. Burke had extensive experience with the PPG, readily acknowledged prior problems with the test and testified about changes to the test that significantly reduced false positives or negatives, as well as increased identification of various factors that may invalidate the results, like the subject moving around in the chair, holding his breath, and closing his eyes. He actually participated in developing some of those changes, as well as studies regarding the reliability of the test as a result of those changes. (TT, pp. 98-106; R., pp. 98-106).

Trial counsel had previously handled SVPA cases and was well aware of PPG evidence. She also knew Dr. Burke was a very credible witness, and it was highly likely the PPG evidence

would be admitted. The State gave counsel free access to Dr. Burke prior to trial to discuss the evaluation, and based on her discussion with Dr. Burke, counsel may well have made a strategic decision not to move to exclude the PPG evidence based on the strength of Dr. Burke's knowledge, which would be strong support for admitting the evidence. Appellant may contend this is pure speculation, and he will be right, but speculation is all the State has without a proper habeas proceeding at which the attorney/client privilege is longer an obstacle, and trial counsel has an opportunity to address the issue.

Finally, Dr. Burke made it clear the PPG results was only **one** part of an extensive evaluation. Considering the other parts of Dr. Burke's evaluation, however, there was sufficient evidence, even without the PPG, to support his conclusion Appellant met the criteria for commitment.

Therefore, even if it was error to admit the PPG evidence, which the State strongly disputes, there is nothing indicating it was so prejudicial it likely impacted the jury's verdict. Rather, the jury's verdict was more likely based on the thoroughness of Dr. Burke's evaluation, Appellant's past conduct, his continued refusal to really accept responsibility for his sexual offenses, the clear indication he needs sex offender treatment for his undisputed pedophilia diagnosis, and his belief he did not need sex offender treatment, which made it extremely unlikely Appellant would participate in treatment if not confined for it.

This issue starkly demonstrates why ineffective assistance of counsel allegations are not proper for consideration on direct appeal when Appellant can use the common law habeas corpus proceeding. Such a proceeding affords the parties an opportunity to create an appropriate record for appellate court review.

Even if the Court considers the issue in this direct appeal, the record indicates the PPG evidence was admissible, and Appellant was not prejudiced because trial counsel did not move to exclude it. Thus, the jury verdict should be affirmed.

CONCLUSION

Based on the foregoing, Respondent respectfully submits the jury verdict finding Appellant is a sexually violent predator and the Order committing him for long term, control, care and treatment should be affirmed.

Respectfully submitted,

ALAN WILSON
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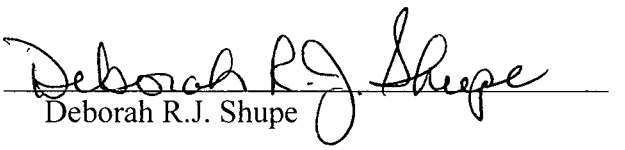
By: 
Deborah R.J. Shupe

March 3, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
The Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2015-002241

IN THE MATTER OF THE CARE AND TREATMENT OF
TIMOTHY GROVES OXENDINE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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