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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY

Roger E. Henderson, Judge

Appellate Case No. 2018-001442

Case No.

The State of South Carolina, Respondent,

versus

Larry James Tyler, Appellant.

FINAL BRIEF OF APPELLANT

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INDEX

[1]Rule 52(a), SCRCP.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I The Sexually Violent Predator Act, S. C. Code Ann. § 44-48-10, et seq. provides examiners "reasonable access to the person." S. C. Code Ann. § 44-48-90(C) Does reasonable access to the person require submission to a penile plethysmograph?

II Procedural due process requires: "(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." The State and the trial court failed to provide procedural due process in finding contempt initiated by a return to motion, in failing to apply the correct burden of proof, and refusing to recognize Tyler's right to revoke his consent to the penile plethysmograph?

III The United States Constitution and the South Carolina Constitution protect citizens against unreasonable searches and seizures and self-incrimination and require due process of law. The South Carolina Constitution goes further protecting against "unreasonable invasions of privacy."

IV The penile plethysmograph has correctly been found by other courts as inherently unreliable with a high rate of false positive and false negatives.

V An evaluation by the trial court's appointed expert must be completed within 60 days of the probable cause hearing. Tyler's probable cause hearing was October 26, 2015. On May 16, 2016, Dr. Gehle issued her report. Is Tyler entitled to dismissal for The State's failure to prosecute?

STATEMENT OF THE CASE

The Procedural Time Line:

August 27, 2015. Sexual Predator Referral Form completed by the Multidisciplinary Team found by a vote of 4-1: "The offender satisfies the definition of a sexually violent predatory and a review by the Prosecutor Review Committee is warranted."[2]

August 31, 2015. Prosecutors Review Committee received materials from Multidisciplinary Team.

September 24, 2015. Prosecutors Review Committee found probable cause to believe appellant has been convicted of a sexually violent offense and suffers from a mental abnormality or personality disorder making it likely he will engage in acts of sexual violence if not confined for long-term control, care, and treatment.[3]

October 15, 2015. Petition Pursuant to Sexually Violent Predator Act filed with the clerk of court for Darlington County.[4]

October 16, 2015. Probable Cause Order signed by Judge Paul M. Burch.

October 26, 2015. Probable Cause hearing before Judge Burch.[5]

October 26, 2015. Order for Evaluation Pursuant to the Sexually Violent Predator Act signed by Judge Burch.[6]

November 23, 2015. Order signed by Judge Burch. This Order permits examination of material in possession of The State to be examined by Dr. Gehle or appellant's lawyer.[7]

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[2]Record, page 28, Sexual Predator Referral Form.

[3]Record, page 30, Prosecutor's Review Committee Probable Cause Determination dated September 24, 2015.

[4]Record, page 20, Petition Pursuant to Sexually Violent Predator Act, dated October 12, 2015.

[5]Record, page 267, Transcript of record dated October 26, 2015

[6]Record, page 3, Probable Cause Order dated October 16, 2015.

[7]Record, page 7, Order dated November 23, 2015.

January 12, 2016. Tyler's counsel move for dismissal upon the ground The State had not met the statutory time lines.[8]

May 16, 2016. Dr. Gehle issued her report concluding Tyler did not meet the criteria to be considered a sexually violent predator. There is nothing to suggest Tyler did not cooperate with her evaluation.[9] Dr. Gehle did not request or require a PPG as part of her pre-commitment evaluation.[10]

Before July 7, 2016. The State "requested a **consultation evaluation**" of Tyler by the Medical University of South Carolina's Sexual Behaviors Clinic and Lab.[11] A copy of the request is not available.

July 7, 2016. Consultation Evaluation Examinee Consent signed by appellant who agreed to a ***Consultation Evaluation.***[12] The consent unambiguously stated, "You may revoke your consent to one or more of these evaluation tests and/or assessments at any time prior to their completion by verbally vising the test or assessment administrator. Failure to complete a recommended test or assessment may prevent completion of part or the entire evaluation." Tyler declined the penile plethysmograph (PPG),[13] as was his right.[14]

August 18, 2016. Return to Motion to Dismiss and for Trial; Motion to Compel Cooperation with Evaluation. Attachments include inadmissible authority from other cases in the court of common pleas.

September 8, 2016. Motion to Dismiss before Judge Roger E. Henderson.[15]

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[8]Record, page 143, Motion to Dismiss filed January 12, 2016.

[9]Record, page 11, Order dated September 16, 2016, ¶ 4.

[10]Record, p. 169, Motion to Alter or Amend Judgment, last paragraph.

[11]Record, page 227, Letter from Dr. Gottfried to James G. Bogle.

[12]Record, page 157, Consultation Evaluation Examinee Consent, last paragraph.

[13]Record, page 227, Letter from Emily D. Gottfried, to James G. Bogle.

[14]Record, page 157, Consultation Evaluation Examinee Consent, last paragraph.

[15]Record, page 276, Transcript dated September 8, 2016.

September 16, 2016. Order signed by Judge Henderson.[16] This Order denies the Motion to Dismiss, holds the issue of contempt in abeyance to permit cooperation, finding appellant will be held in contempt and incarcerated if an affidavit is provided to the court, and tolls all time limits until appellant cooperates with the evaluation.

October 4, 2016. Affidavit of Emily D. Gottfried, Ph.D.[17]

October 31, 2016. Order signed by Judge. Henderson. This Order finds appellant in contempt, continues his detention in the Darlington County Detention Center, and tolls are statutory time limits until appellant cooperates with the evaluation.[18]

November 16, 2016. Motion to Alter or Amend Judgment filed.[19]

July 13, 2018. Hearing before Judge Henderson on the Motion to Alter or Amend Judgment.[20]

July 16, 2018. Order signed by Judge Henderson. This Order denies the Motion to Alter or Amend Judgment.[21]

The appellant Tyler appeals from the Contempt Order dated October 31, 2016, and the Order denying reconsideration dated July 16, 2018, Notice of Appeal was filed and served August 1, 2108. This appeal is from an order holding Appellant Larry James Tyler in contempt of court for failing to submit to a PPG as part of an exam to determine whether Tyler suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence, if not confined to a secure facility for long-term control, care, and commitment.

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[16]Record, page 11, Order dated September 16, 2016.

[17]Record, page 266, Affidavit of Emily D. Gottfried.

[18]Record, pages 15-16, Order dated October 31, 2016.

[19]Record, page 168, Motion to Alter or Amend Judgment filed November 18, 2016.

[20]Record, page 295, Transcript dated July 13, 2018.

[21]Record, page 14, Order dated July 17, 2018.

FACTS

There are few facts because there was no testimony, no exhibit, and no stipulations–only a petition, motions, arguments, and orders. Without conceding the correctness of the petition, motions, arguments, and orders, the trial judge proceeded on these representations and assumptions.

Larry James Tyler was born in 1953. (Ironically, his month and day of birth are redacted by The State to protect his privacy while it seeks PPG testing.)[22] In 1993, he pled guilty in Texas to indecency with a child by contact. In 2013, he pled guilty to sexual exploitation of a minor in the second degree, criminal solicitation of a minor, disseminating harmful material to a minor, and contributing to the delinquency of a minor. On the sentence sheets for each of the 2013 offences, the trial judge checked the box for "NON-VIOLENT."[23]

May 16, 2016. Dr. Gehle's report concluded "that [Tyler] did not meet the criteria to be considered a sexually violent predator." There is nothing to suggest Respondent did not cooperate with her evaluation."[24]

Tyler, had he consented, would have had his penis hooked to the machine for as long as three and a half hours with probes on his penis. The State would then subject him to watching pornographic images and hearing pornographic dialogue with his penile responses measured.[25]

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[22]Record, pages 32, 35, 37, and 38, Sentence Sheets.

[23]Record, pages 32, 35, 37, and 38, Sentence Sheets.

[24]Record, page 12, ¶ 4, Order dated September 16, 2016.

[25]Record, page 281, lines 15-19.

STANDARD OF REVIEW

"Questions of statutory construction are a matter of law."*Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011). The Court reviews questions of law de novo. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012).[26]

The appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000); State v. Jones, 364 S.C. 51, 610 S.E.2d 846 (Ct.App.2005); State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct.App.2000). The appellate court may only reverse where there is clear error. Id.; see also *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001) (holding in a criminal case the appellate court is bound by the trial court's preliminary factual findings in determining the admissibility of certain evidence unless the findings are clearly erroneous, and its review extends only to determining whether the trial judge abused his discretion).

The "clear error" standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently. *Easley v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001). Rather, the appellate court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed. Id.

An appellate court must affirm the trial court's ruling if there is any evidence to support the ruling. *Brockman*, 339 S.C. at 66, 528 S.E.2d at 666. Accordingly, we will apply an "any evidence" standard to the circuit judge's ruling. See *State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct.App.2002).[27]

However, "Questions of statutory [or constitutional] construction are a matter of law." *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011). The Court

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[26]*Matter of Chapman*, 419 S.C. 172, 178, 796 S.E.2d 843, 846 (2017).

[27]*State v. Pichardo*, 367 S.C. 84, 95–96, 623 S.E.2d 840, 846 (Ct. App. 2005)

reviews questions of law de novo. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012).[28]

When the trial court does not follow the mandated procedures, the appellate court, rather than the "clear error" standard the appellate court must answer a question of law. South Carolina appellate courts have jurisdiction to correct errors of law.[29]

[28]*Matter of Chapman*, 419 S.C. 172, 178, 796 S.E.2d 843, 846 (2017).

[29]*State v. Cochran*, 369 S.C. 308, 313, 631 S.E.2d 294, 297 (Ct. App. 2006).

ARGUMENT

I

The Sexually Violent Predator Act[30] provides examiners "reasonable access to the person."[31] Does reasonable access to the person require submission to a penile plethysmograph?

The statute provides, "All examiners are permitted to have **reasonable access to the person** for the purpose of the examination, as well as access to all relevant medical, psychological, criminal offense, and disciplinary records and reports." (Emphasis added). The question of first impression is the meaning of "reasonable access to the person?" Interpreting a similar statute, the Supreme Judicial Court of Massachusetts observed, "The word 'examination is not defined, although in prior cases we have suggested that the terms 'examination' and 'interview' in the context of [the statute] are essentially interchangeable."[32]

The Act does not require a PPG or submission to any particular test. The order appointing the examiner did not mention submitting to a PPG. No evidence was submitted by the State as to the necessity of the PPG. Dr. Gehle of the South Carolina Department of Mental Health completed her examination without a PPG. That the PPG is a standard part of the Sexual Behaviors Clinic and Lab (SBCL) evaluation protocol does not make it reasonable to subject Tyler to this degrading process.

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[30]S. C. Code Ann. § 44-48-10, *et seq*.

[31]S. C. Code Ann. § 44-48-90(C)

[32]*Com. v. Felt*, 466 Mass. 316, 320, 994 N.E.2d 374, 378 (2013), citing *Commonwealth v. Connors*, 447 Mass. at 317 n. 7, 850 N.E.2d 1038, quoting *Commonwealth v. Poissant*, 443 Mass. 558, 559, n. 1, 823 N.E.2d 350

In the Middle Ages, when the judicial process failed to decide the guilt or innocence of person accused of a crime, he was subjected to a trial by fire[33] or trial by ordeal.[34] In the trial by fire, the accused was forced to snatch an object out of a fire or forced to walk over hot coals. If the person showed no sign of burns after a few days, he was innocent. The experts of the day claimed that God would intervene to save this person during the proceeding, if he were innocent. Some people can actually walk over hot coals without getting burned, but others cannot. No one today would think those that could were innocent or those that could not were guilty.

The PPG shares two similarities with trial by fire. Both are inhumane and both fail as a valid indicator of guilt. The PPG examination is not accepted as a predictor of recidivism. The PPG has a high likelihood of having a false positive. One court ruling on this testimony said:

> Dr. Plaud agreed that false positives and false negatives are an issue with the PPG, and had previously written in an article that the PPG has a false positive error rate of about thirty-five percent. About one-third of sexual offenders show no arousal pattern in response to the exam, and "the vast majority of rapists" show no deviant arousal according to the exam.[35]

With 35% false positives, would a reasonable person put his liberty at risk by taking such an exam? Perhaps this would be a risk worth taking and a humiliation worth enduring, if there were an upside. But the courts have consistently held that passing the PPG does not benefit the defendants. "While there may be some evidence supporting Kennedy's claim that he is not a sexually violent predator, including a normal PPG test

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[33]*Miller v. Warden, Maryland House of Correction*, 16 Md. App. 614, 631, 299 A.2d 862, 872 (1973), overruled by *Biddle v. State*, 40 Md. App. 399, 392 A.2d 100 (1978)

[34]*State v. Morgan*, 137 S.W.3d 477, 482 (Mo. Ct. App.).

[35]*Commonwealth v. Ortiz*, 93 Mass. App. Ct. 381, 384, 100 N.E.3d 790, 794 (2018)

result, there is more than enough evidence to support the decision reached by the trial court.[36] This is the judicial equivalent of "heads I win, tails you lose."

Kennedy also negates The State's position that the PPG is necessary for Dr. Gottfried to include the PPG in her examination. Other experts, including Dr. Gehle in this case and Dr. Berg in *Matthews* managed well without the draconian measures of the PPG.

> Dr. Elin Barth Berg testified on behalf of the State. Dr. Berg conducted a three hour interview with Matthews, and spent four hours reviewing the records supplied by the Attorney General. Dr. Berg testified Matthews suffers from pedophilia. She stated Matthews has a "probable risk of recidivism of sexually violent acts in the community," and it was "more likely than not" that Matthews would re-offend.[37]

Subjecting Tyler or anyone to pornographic materials is not only degrading, but also subjects him to materials that perhaps violate the law, if one possessed these materials in a different setting. By way of analogy, this is similar to making a determination that a recovering alcoholic is likely to relapse because when given a drink, he desires another. Yet many recovering alcoholics stay sober, not because they can taste a drink and not want another, but because they know to stay away from alcohol.

One could substitute PPG for "lie detection" or "polygraph" in these examples.

- "Lie detection through physical change is actually a throwback to early forms of trial by ordeal. There are reports of a deception test used by Indians based on the observation that fear may inhibit the secretion of saliva. To test credibility, an accused was given rice to chew. If he could spit it out he was considered innocent, but if it stuck to his gums he was judged guilty."[38]

- "Indeed, the potential for misleading juries is so great that it could be strongly argued that the admission of polygraph results in criminal trials is tantamount to substituting a new form of trial by ordeal i. e., trial by polygraph for the constitutionally mandated trial by jury. A defendant's ability to pass a polygraph test would, in a very real sense, predetermine the eventual conclusion of guilt or

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[36]*In re Care & Treatment of Kennedy*, 353 S.C. 394, 398, 578 S.E.2d 27, 28 (Ct. App. 2003)

[37]*In re Matthews*, 345 S.C. 638, 647, 550 S.E.2d 311, 315 (2001)

[38]*People v. Wilson*, 78 Misc. 2d 468, 474, 354 N.Y.S.2d 296, 304 (Co. Ct. 1974)

> innocence by the jury. For this reason, it is doubly important that polygraph results remain inadmissible unless sufficient empirical evidence is developed that juries can adequately deal with them."[39]

When the legislature passed the Sexually Violent Predator Act it provided all examiners reasonable access to the person for examination, and access to all relevant medical, psychological, criminal offense, and disciplinary records and reports.[40] This is not unfettered access. It is reasonable access. There is no indication this includes having Tyler's penis connected to a machine for three and one-half hours while subjecting him to pornography and other sexual materials. Tyler provided reasonable access for the examiner. The trial court erred in holding him in contempt.

Other remedies and procedures are available to The State. As Massachusetts determined,

> However, we conclude that to permit the defendant to offer his own expert testimony, based on personal interviews, while refusing to submit to interviews with court-appointed experts, would offend basic notions of fairness in such proceedings.[41]
>
> [W]here a defendant refuses to be interviewed, the qualified examiners' reports may be completed without the benefit of personal interviews. However, in such a case, the defendant has elected to limit the extent to which his or her current mental state may be examined.[42]
>
> "Contrary to the Commonwealth's contention, a defendant's refusal to be interviewed personally as part of a [statutory] examination does result in a penalty—namely, that a defendant may not introduce expert testimony based on a personal interview."[43]

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[39] *McLemore v. State*, 87 Wis. 2d 739, 751, 275 N.W.2d 692, 698 (1979)

[40] S. C. Code Ann. § 44-48-90(C).

[41] *Com. v. Connors*, 447 Mass. 313, 317, 850 N.E.2d 1038, 1042 (2006)

[42] *Com. v. Felt*, 466 Mass. 316, 322, 994 N.E.2d 374, 379 (2013)

[43] *Com. v. Felt*, 466 Mass. 316, 324, 994 N.E.2d 374, 381 (2013)

Unlike *Connors* and *Felt*, Tyler consented to the examination, he only refused, and reasonably so, the PPG.

The use of a PPG exceeds the statutory requirements, exceeds reasonable access, and is unnecessary for the examination provided by S. C. Code Ann. § 44-48-90(c),

II

The United States Constitution and the South Carolina Constitution protect citizens against unreasonable searches and seizures[44] and self-incrimination[45] and require due process of law.[46] The South Carolina Constitution goes further protecting against "unreasonable invasions of privacy."[47]

Here there was no evidence, testimony, or exhibit to support the trial court's ruling nor did the trial court address the Constitutional and due process issues. This reduces this issue to a question of law regarding searches and seizures, self-incrimination, due process of law, and the right to privacy.

If The State wished to search Mr. Tyler or his premises for sex toys, dildos, vibrators, or pornography, the state and federal constitutions require a search warrant. Here The State wishes to go further with less protection–it wishes to search Mr. Tyler's innermost thoughts[48] and fantasies with a penile plethysmograph, a tool found unacceptable by many

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[44]*United States Constitution, Amendment IV*: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Also, *South Carolina Constitution, Article I, § 10.*

[45]*United States Constitution, Amendment V*: "No person …shall be compelled in any criminal case to be a witness against himself, …." Also, South Carolina Constitution, Article 1, § 12.

[46]*United States Constitution, Amendment XIV*: "No State shall … deprive any person of life, liberty, or property, without due process of law ….". Also, South Carolina Constitution, Article I, § 3.

[47]*South Carolina Constitution, Article I, § 10*: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated …."

[48]*United States v. Weber*, 451 F.3d 552, 562–63 (9th Cir. 2006): "Plethysmograph testing not only encompasses a physical intrusion but a mental one, involving not only a measure of the subject's genitalia but a probing of his innermost thoughts as well."

courts because of its undocumented reliability with a high rate of false positives and false negatives.

> This examination involves the use of a device known as a plethysmograph which is attached to the subject's penis. In some situations, the subject apparently may be required, prior to the start of the test, to masturbate so that the machine can be "properly" calibrated. The subject is then required to view pornographic images or videos while the device monitors blood flow to the penis and measures the extent of any erection that the subject has. The size of the erection is, we are told, of interest to government officials because it ostensibly correlates with the extent to which the subject continues to be aroused by the pornographic images.[49]

McLaurin concluded,

> [W] hold that the plethysmographic condition does not bear adequate relation to the statutory goals of sentencing to outweigh the harm it inflicts, that it involves a greater deprivation of liberty than is reasonably necessary to serve any of those statutory goals, and that it may not, consistent with substantive due process, be imposed on McLaurin.[50]

President Jimmy Carter, during an interview with *Playboy* magazine admitted, "I've looked at a lot of women with lust. I've committed adultery in my heart many times." Would anyone seriously suggest President Carter be imprisoned for his thoughts? Neither The State nor anyone else may probe one's innermost thoughts for inappropriate sexual thoughts or fantasies if one does not act on those thoughts or fantasies.

In 1993, when Mr. Tyler was 40 years old, he pled guilty in Texas to indecency with a child by contact. He served his sentence. In 2013, he pled guilty to three offenses in South Carolina, none of which involve physical contact with a minor. The State seeks to compel potentially self-incriminating testimony from Mr. Tyler through the use of a PPG, which could cause lifetime incarceration, either for his thoughts or because of a false positive from a machine noted for its inaccuracy. Such testing violates due process through an unconstitutional search and seizure, forced self-incrimination, and denial of the right of privacy.

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[49] *United States v. McLaurin*, 731 F.3d 258, 259 (2d Cir. 2013).

[50] *United States v. McLaurin*, 731 F.3d 258, 264 (2d Cir. 2013).

Generally recognized as one of the greatest appellate justices in American judicial history, Justice Robert H. Jackson, wrote, "We are not final because we are infallible, but we are infallible only because we are final."[51] The Supreme Court has made dreadful and egregious errors,[52] usually when placing public sentiment and politics ahead of the United States Constitution, placing the Court on the wrong side of history.

The issue is not whether Tyler is sympathetic or appealing; the issue is whether we are a government of law and not of men.[53] If public opinion or politics override due process and the state and federal constitutions, we succumb to mob rule. As Justice Neil Gorsuch said in the opening statement of his confirmation hearing, "For the truth is, a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for the policy results he prefers rather than those the law compels." The Court is not asked to like the result, only to reach the result the law compels.

Justice Thurgood Marshall could have been writing about the PPG when he wrote in dissent,

> History teaches that grave threats to liberty often come in times of urgency when constitutional rights seem too extravagant to endure. The World War Ii relocation-camp cases, … and the Red scare and McCarthy-Era internal subversion cases, are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it. [54]

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[51]*Brown v. Allen*, 344 U.S. 443, 540, 73 S. Ct. 397, 427, 97 L. Ed. 469 (1953)

[52]*Scott v. Sandford*, 60 U.S. 393 (1857), *Plessey v. Ferguson*, 16 Sct. 1138 (1896); *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), and Korematsu v. U.S., 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

[53]*Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803). "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

[54]*Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989).*

How far we have come in our depreciation of the Fourth Amendment since Justice Frankfurter wrote in reversing a conviction based evidence from pumping the defendant's stomach content, "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."[55] In the 67 years after *Rochin*, The State seeks to extract by force Tyler's innermost thoughts.

"[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling."[56] If *Rochin* sets the floor, the PPG is subterranean.

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[55]*Rochin v. California*, 342 U.S. 165, 173, 72 S. Ct. 205, 210, 96 L. Ed. 183 (1952).

[56]*State v. Counts*, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015).

III

Procedural due process requires: "(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses."[57] The State and the trial court failed to provide procedural due process in finding contempt initiated by a return to motion, in failing to apply the correct burden of proof, and refusing to recognize Tyler's right to revoke his consent to the penile plethysmograph.

CONTEMPT

The State initiated contempt proceedings, not by an affidavit or even a verified complaint, but by its Return to Motion to Dismiss and For Trial: Motion to Compel Cooperation and Evaluation (Return to Motion).[58]

"Proceedings to punish for indirect contempt ordinarily must be instituted by presentment to the court of an accusation, affidavit, or other pleading setting forth the facts constituting the contempt."[59] Neither a return to motion nor a motion is an accusation (a formal charge of criminal wrongdoing),[60] nor pleading (complaint, answer, or reply to counterclaim)[61] is an affidavit (a sworn written statement),[62] "The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect."[63]

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[57]*In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003).

[58]Record, pp. 153-156, Return to Motion to Dismiss and For Trial: Motion to Compel Cooperation and Evaluation.

[59]79 C.J.S. *Contempt*, § 90.

[60]*Black's Law Dictionary (8th ed.),* p. 23.

[61]Rule 7, SCRCP, distinguishes a pleading from a motion or other paper.

[62]""An affidavit is a voluntary ex parte statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation ... It differs from an oath in that an affidavit consists of statements of fact which is sworn to as the truth, while an oath is a pledge...." *State v. Dunbar*, 361 S.C. 240, 603 S.E.2d i615 (Ct. App. 2004).

[63]*Miller v. Miller*, 375 S.C. 443, 455, 652 S.E.2d 754, 760 (Ct. App. 2007), *citing Toyota of Florence, Inc. v. Lynch*, 314 S.C. at 267, 442 S.E.2d at 617.

The trial court relies upon the affidavit of Dr. Gottfried to make a finding of contempt of court with no opportunity for Mr. Tyler to cross-examine Dr. Gottfried, to challenge her credentials, the inclusion of the PPG in the assessment protocol of the Sexual Behaviors Clinic and Lab of the Medical University of South Carolina, the Constitutionality of the penile plethysmograph. Mr. Tyler is in jail, potentially for the rest of his life, without proper process, without a word of testimony, with no opportunity for cross-examination, and without due process of law.

> "[B]efore a person can be found guilty of contempt not committed in the presence of the Court, he must have due and reasonable notice of the proceeding. A rule to show cause, an attachment, or other process should issue." And it is said in *State v. Nathans*, 49 S.C. 199, 27 S.E. 52, 57, 58, that "the almost universal method by which contempt proceedings are begun is by affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence, an affidavit is essential." The verified petition of the party applying for a rule to show cause, however, is a substantial compliance with the principle of law above stated, when and if the petition alleges facts sufficient upon which to base the issuance of such order."[64]

BURDEN OF PROOF

The burden of proof for a finding of civil contempt is by clear and convincing evidence.[65] Just as the standard of review is critical in appellate cases, the burden of proof is critical in cases requiring an elevated burden of proof other than "mere preponderance of the evidence." Can one imagine proof of facts by clear and convincing evidence with no testimony and no exhibits? This is particularly true where the court appointed Marie E. Gehle, Psy.D as the qualified expert to examine [Tyler]"[66] and Dr. Gehle's report concluded

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[64]*Hornsby v. Hornsby*, 187 S.C. 463, 198 S.E. 29, 32 (1938), citing 13 Corpus Juris 88.

[65]*Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998).

[66]Record, page 6, Order for Evaluation Pursuant to the Sexually Violent Predator Act, last paragraph.

"[Tyler] did not meet the criteria to be considered a sexually violent predator" and nothing suggested he did not cooperate with her evaluation.[67]

"Civil contempt must be proven by clear and convincing evidence." Clear and convincing evidence is evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established, and, as well, as evidence that proves the facts at issue to be highly probable."[68]

RIGHT TO REVOKE CONSENT

On July 7, 2016, Mr. Tyler signed his consent for evaluation.[69] This consent included a provision for the penile plethysmograph,

> Males Only - Penile Plethysmography. This assessment involves measuring your sexual arousal while you listen to audiotapes and/or look at photographic images and/or video images. This part of the evaluation may take several hours, depending on which type of stimuli (video images, photographic images and/or audiotapes) is used. You will be sitting in a room by yourself during the assessment. One or more of the following may be used: a blood pressure measurement device on your arm or finger, tube(s) around your chest to measure respiration, small electrodes on your fingers and/or hands to measure skin resistance changes, a sensor to measure heart rate and a pad in your seat to measure movement. The assessment administrator will assist with placement of these measurement devices. A video camera may monitor your upper body including your face, chest and arms to record your attention to visual stimuli and body movement. The video recording will become a part of your forensic file maintained by the SBCL. You will be given instruction on how you are to place an elastic band type sensor around your penis to measure sexual arousal. Your groin area will not be exposed during the assessment nor will it be visible to the camera monitoring your upper body. Some of the material you will be hearing and/or seeing is sexually explicit and some audio descriptions and photographic images may be of

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[67]Record, page, 12, ¶ 4, Order (denying dismissal)..

[68]Clear and convincing evidence is evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established, and, as well, as evidence that proves the facts at issue to be highly probable." *United States v. Springer*, 715 F.3d 535, 538 (4th Cir. 2013)

[69]Record, pages 162, Consultation Evaluation Examinee Consent and Authorization to Use/Disclose Information.

> sexual coercion and/or violence. You may listen to audio that verbally describes sexual activity between adults and/or between adults and children. Visual images may include males and/or females, clothed children, nude and/or clothed adults, and sexually explicit behavior between adults. You will be asked to rate your level of sexual arousal to each visual image and/or audio description. A computer in the next room where the assessment administrator sits will record your sexual arousal to these stimuli[70].

The Consent also provided, "I understand that I may at any time prior to completion of a given evaluation test or assessment withdraw my consent for that test for assessment of for the entire examination."[71]

Mr. Tyler exercised his right under the agreement to withdraw his consent to the penile plethysmograph, one paragraph of a six-page document describing tests and assessments and permitting broad disclosure of the test data and results. Interestingly, several tests, such as Multiphasic Sex Inventory II, the Abel Assessment for Sexual Interest-2, and blood and urine tests will be evaluated and interpreted by someone other than Dr. Gottfried. The inference from the paragraph on the polygraph examination is it will be administered by someone or than Dr. Gottfried. Judge Henderson did not appoint Nichols & Molinder Assessments, Inc. in Washington State to score and interpret the MSI II test data nor Abel Screening of Atlanta, Georgia, to analyze the data of the AASI-2. Still, Mr. Tyler was willing to submit to those tests. Dr. Gottfried should have administered all tests other than the PPG and submitted those results along with her affidavit.

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[70]Record, page 158, Consultation Evaluation Examinee Consent and Authorization to Use/Disclose Information.

[71]Record, page 161, last sentence, Consultation Evaluation Examinee Consent and Authorization to Use/Disclose Information.

IV

The penile plethysmograph has correctly been found by other courts as inherently unreliable with a high rate of false positive and false negatives.

These courts rejected the penile plethysmograph:

- The PPG"has no accepted standards in the scientific community."[72]

- "In fact, courts are uniform in their assertion that the results of penile plethysmographs are inadmissible as evidence because there are no accepted standards for this test in the scientific community."[73]

- The trial court excluded evidence of the PPG offered by the defendant in a sexually violent predator case. The experts testified "the PPG is not a scientifically reliable and valid test."[74]

- The trial court excluded the defendant's proffered results of the PPG tests stating, "We agree with the trial court that the evidence before it by no means established the reliability of the plethysmograph; there is a substantial difference of opinion within the scientific community regarding the plethysmograph's reliability to measure sexual deviancy. ... (identifying several problems with the reliability of the plethysmograph, namely 'lack of standards for training and interpretation of data, lack of norms and standardization and susceptibility of the data to false negatives and false positives,' and concluding that 'despite the sophistication of the current equipment technology, a question remains whether the information emitted is a valid and reliable means of assessing sexual preference"); ... (stating that a problem with the reliability of PPG testing is that penile response is subject to voluntary control, and the test should not be used to determine whether or not an individual has engaged in deviant behavior). Other jurisdictions have also found the plethysmograph unreliable as a measure of sexual deviancy.[75]

  (Citations omitted)

- "[T]he PPG's lack of a standard set of stimuli or agreed-upon standards for the testing creates … a 'major problem." "T]he procedure appears inherently dubious."

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[72]*United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995).

[73]*Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000)

[74]*Kirk v. State*, 520 S.W.3d 443, 463 (Mo. 2017), cert. denied, 138 S. Ct. 982, 200 L. Ed. 2d 261 (2018)

[75]*State v. Spencer*, 119 N.C. App. 662, 666–67, 459 S.E.2d 812, 815–16 (1995).

"[T]he test has a significant error rate with false positives above thirty-three percent, and potential false negatives…."[76]

- "Based on our review of the record before the judge, we conclude that the judge did not abuse his discretion in excluding the PPG examination results; it has not been established that use of the PPG exam to show the likelihood of sexual reoffense is generally accepted in the clinical community or that a review of the Daubert–Lanigan factors favors admission of evidence based on such an exam."[77]

It is ironic Tyler may be incarcerated for life for refusing a test whose results are inadmissible.[78]

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[76]*Commonwealth v. Ortiz*, 93 Mass. App. Ct. 381, 388, 100 N.E.3d 790, 797 (2018)

[77]*Commonwealth v. Ortiz*, 93 Mass. App. Ct. 381, 387–89, 100 N.E.3d 790, 796–98 (2018)

[78]*United States* v. Glanzer, 232 F.3d at 1266; see also United States v. Powers, 59 F.3d *v. Weber*, 451 F.3d 552, 565 (9th Cir. 2006), citing *Glanzer*, 232 F.3d at 1266; see also *United States v. Powers*, 59 F.3d 1460, 1 470-71 (4th Cir.1995) (concluding that a district court did not abuse its discretion in denying the admissibility of expert testimony on plethysmograph testing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), because, although "useful for treatment of sex offenders" there was "extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test"): *Laws*, supra, at 95-97 (noting the unlikelihood that plethysmograph testing can satisfy several of the Daubert criteria). But see Alex Kozinski, *Brave New World*, 30 *U .C. Davis L. Rev*. 997, 1 008-09 (1997) (suggesting that in certain circumstances plethysmograph testing might meet the requisites of Daubert). Furthermore, although the First Circuit noted that "the plethysmograph is widely used in the scientific community for the treatment of pedophilia," that court also stated that "its use for screening is debatable and the scientific community is not of one mind." *Berthiaume*, 142 F.3d at 17; see also *Simon & Schouten*, *supra*, at 511 "plethysmography's 'scientific status remains that of an experimental technique'").

V

> An evaluation by the trial court's appointed expert must be completed within 60 days of the probable cause hearing. Tyler's probable cause hearing was October 26, 2015. On May 16, 2016, Dr. Gehle issued her report. Is Tyler entitled to dismissal for The State's failure to prosecute?

Tyler moved for dismissal January 12, 2016,[79] 16 days after the statutory deadline for Dr. Gehle's report.[80]

One must move for a continuance before the expiration of the deadline.[81] Had The State complied with the statutory deadlines imposed by statute, the court would have received Dr. Gehle's report by December 27, 2015, and the jury trial would have begun by April 2, 2016. Because The State did not comply with the statutory deadlines, Tyler was entitled to dismissal, without prejudice to The State. However, because Tyler had served his sentence, he was entitled to release from custody.[82]

The trial judge's Order denying dismissal, did not address the gist of the Motion to Dismiss–the failure to comply with time limits.

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[79]Record, page 143, Motion to Dismiss filed January 12, 2016.

[80]S. C. Code Ann. § 44-48-80(D): "The expert must complete the evaluation within sixty days after the completion of the probable cause hearing."

[81]*Louisiana-Pac. Corp. v. United States*, 2 Cl. Ct. 743, 746 (1983).

[82]*In re Miller*, 393 S.C. 248, 261, 713 S.E.2d 253, 259 (2011)

VI

The trial court must make findings of fact and separate conclusions of law.[83] The trial court did not address Mr. Tyler's assertion these were not sexually violent crimes.

At the July 13, 2018 hearing, Larry Tyler asserted in argument, "Whatever they presented at the hearing was illegal because the sexual convictions that I was convicted with, the four of them, are not sexually violent crimes." They are not-violent crimes."[84] The trial judge promised, "Okay. I'll look into that."[85]

The Sentence Sheet for sexual exploitation of a minor, second degree checked "☐ NON-VIOLENT,"[86] as did the Sentence Sheet for "Criminal Solicitation of a Minor,[87] and the Sentence Sheet for disseminating harmful material or exhibiting harmful influence to a minor.[88]

A thorough response to Mr. Tyler's assertions is especially relevant where a trial judge, assistant attorney-general, and defense counsel made these statements:

- Mr. Bogle voluntarily admitted, Mr. Tyler's "Prior convictions are kind of thin."[89]
- Mr. Falk argued, the more recent offense was not a violent crime of violence and were long after his prior offense in the 1990's, concluding, "this is a pretty thin index charge."[90]

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[83]Rule 52(a), SCRCP.

[84]Record, p. 315, lines 22-25, Transcript of Record, July 13, 2018.

[85]Record, p. 316, line 12, Transcript of Record, July 13, 2018.

[86]Record, page. 32, Sentence Sheet dated February 27, 2013.

[87]Record, page. 35, Sentence Sheet dated February 27, 2013.

[88]Record, page. 37, Sentence Sheet dated February 27, 2013.

[89]Record, p. 272, lines 22-23.

[90]Record, p. 273, line 18, through p. 274, line 5.

- Judge Burch responded, "Based on the file that I reviewed this is not–this is indeed not one of the strongest cases I have reviewed over the year."[91]

These statements and the weakness of The State's case are bolstered by the fact Mr. Tyler received no sex offender treatment during his incarceration with the South Carolina Department of Corrections.[92] If The State believed Mr. Tyler was sexually violent predator, it had an obligation to provide treatment during his incarceration.

> It shall be the policy of this State in the operation and management of the Department of Corrections to manage and conduct the Department in such a manner as will be consistent with the operation of a modern prison system, and with the view of making the system self-sustaining, and that those convicted of violating the law and sentenced to a term in the State Penitentiary shall have humane treatment, and be given opportunity, encouragement and training in the matter of reformation.[93]

The court should treat the failure to treat as an admission by The State no treatment was needed.

Three days later after promising to look into this issue, the trial judge issued his generic Order without specifically addressing any issue raised by Larry Tyler or his lawyer.[94]

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[91]Record, p. 274, lines 8-10.

[92]Record, p. 273, lines 2-4,

[93]S. C. Code Ann. § 24-1-20

[94]Record, p. 17, Order dated July 16, 2018.

CONCLUSION

Objections to penile plethysmography are best summarized by Judge Noonan's concurring opinion in *U.S. v. Weber*.

> Judge Berzon's excellent opinion is deserving of support. I would, however, go beyond it to hold the Orwellian procedure at issue to be always a violation of the personal dignity of which prisoners are not deprived. The procedure violates a prisoner's bodily integrity by affecting his genitals. The procedure violates a prisoner's mental integrity by intruding images into his brain. The procedure violates a prisoner's moral integrity by requiring him to masturbate.
>
> By committing a crime and being convicted of it, a person does not cease to be a person. A prisoner is not a mere tool of the state to be manipulated by it to achieve the purposes the law has determined appropriate in punishment. The prisoner retains his humanity and therefore has purposes transcending those of the state. A prisoner, for example, cannot be forced into prostitution to aid the state in securing evidence. A prisoner, for example, cannot be made to perjure himself in order to assist a prosecution. Similarly, a prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmography testing crosses it.[95]

Paraphrasing Justice Ness' dissent in Simmons v. State,[96]

> In view of the fact that I strongly feel from my review of the entire original transcript that appellant's Due Process and other constitutional rights were violated by the trial court proceedings due to the matters hereinafter discussed, I respectfully dissent from the majority opinion.
>
> The majority, examining the alleged errors separately but not in combination, dismissed without passing upon the merits all but one of the grounds asserted by appellant as not properly reviewable on an application for post-conviction relief. However, upon an examination of all of the alleged errors in combination and separately and a consideration of the whole course of the proceedings in accordance with the standard of review as required by *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), it is clear that the alleged errors here present issues of constitutional dimension properly reviewable under the Post-Conviction Procedures Act….

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[95] *United States v. Weber*, 451 F.3d 552, 570–71 (9th Cir. 2006).

[96] *Simmons v. State*, 264 S.C. 417, 424, 215 S.E.2d 883, 886 (1975)

Tyler does not present a post conviction relief case but it contains "all of the alleged errors in combination and separately … present[ing] issues of constitutional dimension.

The appropriate remedy is reversal.

Respectfully submitted,

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The final brief of appellant complies with Rule 211(b), SCACR.

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