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THE STATE OF SOUTH CAROLINA

IN THE 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 REPLY BRIEF OF APPELLANT

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INDEX

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." 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 (Abandoned)

STATEMENT OF THE CASE

The Procedural Time Line includes only events modified or added subsequent to the initial Brief of Appellant):

October 19, 2015. James Falk appointed counsel for Tyler by Order of Judge Scott B. Suggs.

December 14, 2015. Time extended for Marie E. Gehle, Psy.D, to complete evaluation by Order of Continuance of Judge Burch.

January 7, 2016. Tyler's counsel move for dismissal upon the ground The State had not met the statutory time lines.[1]

February 11, 2016. Order denying motion.

February 23, 2016. Tyler's Second Motion to Dismiss, or Alternatively, Motion to Set Deadline for State's Completion of Forensic Evaluation.[2]

March 31. 2016. Dr. Gehle granted additional 45 days to complete evaluation by Order of Judge Burch.

May 16, 2016. The State served its Notice of Retention of Independent Expert.[3]

August 10, 2016. Tyler's Motion to Dismiss, or Alternatively, Motion to Set Date Certain Trial Date.[4]

November 28, 2017. Do we have the letter of James G. Bogle?

FACTS

In 2013, Tyler was sentenced for sexual exploitation of a minor in the second degree and criminal solicitation of a minor (The sentencing sheet does not indicate whether it was a conviction or a plea). Also, he was convicted of 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."[5] This corrects a unintentional misstatement from the Brief of Appellant.[6]

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[1]Record, p. 143, Motion to Dismiss filed January 12, 2016.

[2]Record, p. 147, Respondent's Second Motion to Dismiss, or Alternatively, Motion to Set Deadline for State's Completion of Forensic Evaluation, dated February 23, 2016.

[3]Record, p. 265, Notice of Retention of Independent Expert.

[4]Record, p. 150, Respondent's Motion to Dismiss, or Alternatively, Motion to Set Date Certain Trial.

[5]Record, pp. 32, 35, 37, and 38.

[6]Brief of Appellant, p. 11, second paragraph.

ARGUMENT

I

The SVPA provides examiners "reasonable access to the person." Does reasonable access to the person require submission to a PPG?

Hyperbole, Rhetorical Arguments, and Misleading Analogies versus Lack of Facts

If, as The State argues, "Appellant's brief is replete with hyperbole, rhetorical arguments and misleading analogies, but short on facts. Much of Appellant's brief is designed to distract from the relatively simple issue before this Court….",[7] then this writer apologizes to opposing counsel and this Court.

If the Brief of Appellant is "short on facts," it is because, as the Appellant admitted, "There are few facts because there was no testimony, no exhibit, and no stipulations–only a petition, motions, arguments, and orders.[8]

Reasonable Access

Contrary to The State's argument,[9] in his opening argument, Tyler concedes "The SVPA provides examiners 'reasonable access to the person.'"[10] Tyler then asks, "Does reasonable access to the person require submission to a PPG?"[11]

Who determines what is reasonable access? The State, citing *Matter of Snow*, argues "leave it to medical professionals."[12] *Snow* leaves "to medical professionals the task of determining what is—and what is not—a personality disorder." It does not abdicate decisions of law, such as what is reasonable access or what the Fourth Amendment prohibits or bans, to the medical professionals. However, *Snow* provides major insights to the present case because Dr. Gehle was The State's examiner in *Snow*. In three paragraphs of Snow, Dr. Gehle establishes to the satisfaction of the Supreme Court her ability to determine whether a person is likely to commit acts of sexual violence. Using the same methods the Supreme Court approved in *Snow*, Dr. Gehle concluded "Larry James Tyler does not meet criteria to be considered a sexually violent predator."[13] Importantly, in *Snow* and *Tyler*, she did this without using a PPG.

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[7]Brief of Respondent, p. 8, footnote 4.

[8]Brief of Appellant, *Facts,* P. 11.

[9]Brief of Respondent, p. 8.

[10]Brief of Appellant, p. 14, citing S. C. Code Ann. § 44-48-90(C).

[11]Brief of Appellant, p. 14.

[12]Brief of Respondent, p. 8, citing *Matter of Snow*, 425 S.C. 544, 549, 823 S.E.2d 467, 469 (2019)

[13]Record, p. 264, just above signature..

Hall[14] stands for the proposition, "it is proper to consult the medical community's opinions." *Hall* refers to the medical community, not an individual practitioner. The State candidly admits the views of medical experts do not dictate the Court's decision,[15] but makes no mention of the medical community.

The State is correct as to its "statutory authority to have Appellant examined by a qualified expert of its choice."[16] It does not follow that the State has the final says on who is a qualified expert. The State may offer Dr. Gottfried as an expert witness,[17] however, "The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony."[18] [G]enerally, a witness's expert status will be determined prior to determining the reliability of the testimony."[19] Because Dr. Gottfried, did not testify Tyler had no opportunity to cross-examine regarding her qualifications nor did the trial judge have an opportunity to rule on her qualifications.

The State argues, "The SVPA does not enumerate or limit the diagnostic tools that can be used to evaluate a person subject to its terms, only that a qualified expert use them in rendering an opinion."[20] The appellant disagrees. The diagnostic tools are limited by the term "reasonable access."[21] Who is an expert is a legal and factual question the trial court must decide.

Relatively Simple

The State describes the issue as relatively simple,

> [W]hether, after multiple findings of probable cause to believe the person is a sexually violent predator, a person being evaluated by a qualified expert pursuant to the SVPA can be compelled to comply with testing the expert deems necessary to complete a full psychosexual evaluation in order to determine if the person has a mental abnormality or personality disorder that makes him likely to reoffend sexually if not confined for treatment.[22]

The State's "relatively simple issue" is not so simple. Consider these questions inherent in The State's description:

- What is "probable cause?"
- Who is a qualified expert and who makes the determination based on what facts?

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[14]*Hall v. Fla.*, 572 U.S. 701, 710, 134 S. Ct. 1986, 1993, 188 L. Ed. 2d 1007 (2014)

[15]Brief of Respondent, p. 9.

[16]Brief of Respondent, p. 10.

[17]Rule 702, SCRE.

[18]State v. Robinson, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012), aff'd as modified, 410 S.C. 519, 765 S.E.2d 564 (2014)

[19]*State v. Mealor*, 425 S.C. 625, 646, 825 S.E.2d 53, 65 (Ct. App. 2019), cert. denied (Aug. 5, 2019)

[20]Brief of Respondent, p. 10, last paragraph.

[21]S. C. Code Ann. § 44-48-90(C).

[22]Brief of Respondent, p. 8, footnote 4.

- Are the tests "the expert deems necessary" restricted by the statutory requirement of "reasonable access to the person?"
- Is a "full psychosexual evaluation" included within "an evaluation as to whether the person is a sexually violent predator?"

Probable Cause. Probable cause is not found the definitions of the Sexually Violent Predator Act.[23] In a civil case, the Court of Appeals defined probable cause as "a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise."[24] This requires a present belief of present guilt, not a belief in possible future guilt. The definition is similar in a criminal case. "A reasonable ground to suspect that a person has committed or is committing a crime…"[25]

"On review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding."[26] There is no evidence Tyler suffers from "a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."[27] On May 16, 2016, Dr. Gehle issued her report concluding. "Larry James Tyler does not meet criteria to be considered a sexually violent predator."[28] The State's other expert, Dr. Gottfried, conducted no examination of Tyler when he refused the PPG nor does she explain why she did not use other evaluation tools to which Tyler consented,"[29] such as the Static-99R, "an instrument designed to assist in the estimation of sexual and violent recidivism for sexual offenders. It is the most widely used measure of sexual recidivism."[30] While finding probable cause, Judge Burch said, "this is indeed not one of the strongest cases I have reviewed over the year," but said it gave him concern and he wanted "him checked out." He was about to explain before he was cut off by the assistant attorney general.[31]

Qualified Expert. Dr. Gottfried did not testify. Her affidavit does not demonstrate her qualifications. Tyler had no opportunity to cross-examine her regarding her qualifications.

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[23]S. C. Code Ann. § 44-48-30.

[24]*Gowdy v. Gibson*, 381 S.C. 225, 230, 672 S.E.2d 794, 796 (Ct. App. 2008), aff'd, 391 S.C. 374, 706 S.E.2d 495 (2011)

[25]Black's Law Dictionary (11th ed. 2019)

[26]*Care & Treatment of Chandler v. State*, 382 S.C. 250, 256, 676 S.E.2d 676, 679 (2009)

[27]S. C. Code Ann. § 44-48-30(1)(b).

[28]Record, p. 264, Forensic Psychological Evaluation (just above signature).

[29]Record, p. 266, Affidavit of Emily D. Gottfried, Ph.D.

[30]Record, p. 262, Dr. Gehle's Forensic Psychological Evaluation, first two sentences under *Risk Assessment.*

[31]Record, p. 274, lines 8-20.

Tests. "[32] Does a defendant have the right to contest, question, or cross-examine the expert's qualifications or the reasons the expert demands a particular test? Consider the first expert, Dr. Gehle , Chief Psychologist at the South Carolina Department of Mental Health, did not consider the PPG necessary for an evaluation. Is the appointed expert the sole determiner of what of "the testing deemed necessary"? Could she require a polygraph? Could she require an invasive physical examination such as a blood test or biopsy? Could she require a trial by ordeal? The last question may seem silly until one considers it fits within The State's claim of the authority of its expert.

Psychosexual Evaluation. Psychosexual evaluation is The State's term, not the legislature's nor the court's term. The SVPA does not contain the term psychosexual nor do any South Carolina 74 South Carolina appellate case mentioning the Sexually Violent Predator Act.

The State makes reference to "multiple findings of probable cause"[33] and argues "The testing deemed necessary by a qualified expert is reasonable because it is based on a judicial finding of probable cause."[34] Of the five steps described, four are ex parte proceedings with no participation by Tyler: (1) the Multidisciplinary Team, (2) the Sexual Predator Referral form (one dissenter), (3) the prosecutor's review committee, (4) the initial probable cause hearing on October 16, 2015, and (5) the probable cause hearing on October 26, 2015. The fifth had no witnesses, no evidence, and no testimony.

The State argues "What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'"[35]

- The State, in citing *Skinner*,[36] misses the best quote from Justice Marshall in dissent:, "the issue here is whether the Government's deployment in that war of a particularly Draconian weapon—the compulsory collection and chemical testing of railroad workers' blood and urine—comports with the Fourth Amendment."[37] The compulsory collection and chemical testing of blood and urine, described by Justice Marshall as Draconian, is mild and innocuous when compared with connecting one's penis to a machine for several hours to measure one's reaction child pornography.

- The PPG shares two similarities with trial by ordeal. 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

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[32]Brief of Respondent, p. 14.

[33]Brief of Respondent, pp. 8 (footnote 4) and 16

[34]Brief of Respondent, p. 14.

[35]*Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 1414, 103 L. Ed. 2d 639 (1989)

[36]Brief of Respondent, p. 14.

[37]*Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635, 109 S. Ct. 1402, 1423, 103 L. Ed. 2d 639 (1989)

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."[38]

- *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.[39]

- Subjecting Tyler 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.

- 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.

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."[40]

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."[41]

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

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

[40]*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

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

- "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 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."[42]

Preservation of Constitutional Rights

The State argues, "Appellant failed to preserve the issue that his constitutional rights to procedural due process in connection with the contempt determination were violated."[43] Because there was no testimony and no exhibits, Tyler's first opportunity to raise a constitutional objection was his Motion to Alter or Amend Judgement.[44] His first asserted ground and argument was based on Tyler's "rights protected by both the United States Constitution and South Carolina's Constitution," including substantive due process, unreasonable search and seizure, right to privacy, and self-incrimination.[45]

II

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."

Constitutional Issues

The State introduced 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.

Civil versus Criminal

The State rephrases the question to refer to "the statutory requirement for civil commitment under the SVPA." and asserting "the SVPA is civil, not criminal…[46]

This is a legal fiction, "An assumption that something is true though it may be untrue." It is "judicial reasoning to alter how a legal rule operates." It is "a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object."[47]

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

[43]Brief of respondent, p. 19.

[44]Record, pp. 168-175.

[45]Record, p. 168, Motion to Alter or Amend Judgment, ¶ 1.

[46]Brief of Respondent, *Table of Contents,* p. i; *Statement of Issues on Appeal*, p. 2; *Statement of the Case,* p. 2; *Statement of Facts*, p. 3; *Argument* 1, p. 8; *Argument 2* pp. 15 16, 17 (four references), and 19; *Argument 3,* p. 22 (six references), pp. 23 and 28

[47]*Black's Law Dictionary*, (11th ed. 2019).

The SVPA reads like a criminal procedure statute regarding trial by jury,[48] proof beyond a reasonable doubt,[49] right to counsel,[50] speedy trial,[51] and unanimous verdict.[52] A trite expression is irresistible. If it walks like a duck, talks like a duck, and looks like a duck….

This writer attended *Presenting Cases to the Appellate Courts* on November 30, 2017, a seminar moderated by Chief Judge James E. Lockemy. Judge Lockemy asked for volunteers for a pro bono **criminal** appeal. This writer volunteered. On March 6, 2019, Judge Stephanie McDonald appointed this writer to this appeal. Judges Lockemy and McDonald understand the difference between a criminal and civil appeal and would not have appointed counsel to a civil appeal.

We may all accept the legal fiction of a SVPA case as civil rather than criminal but we are not required to believe it any more than we must believe in the magical powers of the emperor's new clothes.[53]

Procedural Due Process

The State argues "the appellant's procedural due process rights were not violated."[54] Whatever notice Tyler had regarding a contempt proceeding, did not abrogate the requirements for a rule to show cause based upon an affidavit or verified complaint for an alleged contempt not committed in the court's presence[55] nor did it waive the requirement for The State to make a prima facie showing of contempt[56] nor did it waive his "right of cross-examine.[57] With these defects, Tyler had no "opportunity to be heard in a meaningful way" nor is there a record containing the necessary facts for "judicial review."

"The affidavits upon which proceedings in contempt are based should make out a prima facie case of contempt"[58] and the record must disclose facts sufficient to constitute a prima facie case of contempt.[59] "Once the moving party has made out a prima facie case [for contempt], the burden then shifts to the

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[48]S. C. Code Ann. § 44-48-100(a).

[49]S. C. Code Ann. § 44-48-100(a).

[50]S. C. Code Ann. § 44-48-90(B).

[51]S. C. Code Ann. § 44-48-90(B)

[52]S. C. Code Ann. § 44-48-100(a).

[53]*The Emperor's New Clothes*, Hans Christian Andersen (1837).

[54]Brief of Respondent, pp. 20-21.

[55]*State v. Johnson*, 249 S.C. 1, 7, 152 S.E.2d 669, 672 (1967), citing *State v. Blackwell*, 10 S.C. 35; *Hornsby v. Hornsby*, 187 S.C. 463, 198 S.E. 29 (1938).

[56]*State v. Nathans*, 49 S.C. 199, 27 S.E. 52, 58 (1897); *Ibid.* 49 S.C. 199, 27 S.E. 52, 61.

[57]*Arnal v. Arnal*, 363 S.C. 268, 296, 609 S.E.2d 821, 836 (Ct. App. 2005), aff'd as modified, 371 S.C. 10, 636 S.E.2d 864 (2006); Goolsby v. Goolsby, 229 S.C. 101, 111, 92 S.E.2d 57, 62 (1956)

[58]*State v. Nathans*, 49 S.C. 199, 27 S.E. 52, 58 (1897).

[59]State v. Nathans, 49 S.C. 199, 27 S.E. 52, 61 (1897)

respondent to establish his ... defense ,,,,."[60] There was no affidavit making a prima facie case of contempt nor does the record contain sufficient facts to make a prima facie case. The burden never shifted to Tyler to present a defense.

If the State relied upon the Gottfried Affidavit for any element of its case, then it was obligated to make Dr. Gottfried available for cross-examination.

> Cross-examination follows examination in chief by the party who calls the witness. It behooved appellant to produce the affiants as witnesses if she wanted the benefit of their testimony, and let them be subject to cross-examination. The latter is a most valuable right. 'It is the law of evidence that when a witness has been examined in chief, the other party has a right to cross-examine him. * * * The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth.' State v. McNinch, 12 S.C. 89.[61]

"Vital to our assessment of the sufficiency of the evidence are the provisions of our state and federal Due Process Clauses, which provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3.'The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.' *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)."[62] With no complaint, no affidavit, and no rule to show cause, Tyler did not have notice. With The State presenting no evidence, he had nothing to rebut. With no opportunity to cross-examine Dr. Gottfried or any other witness, Tyler had no opportunity to be heard in any meaningful way. With The State failing to present a prima facie case, Tyler had nothing to rebut nor anything to prove.

The contempt Order[63] deprived Tyler of his liberty without due process of law.

Fourth Amendment Search and Seizure

The States appears to concede this is a Fourth Amendment case by stating in its Standard of Review, "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."[64] The State asserts, "The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence, but must affirm the trial court if there is any evidence supporting the ruling."[65]

Where is the evidence? There are few facts because there was no testimony, no exhibit, and no stipulations–only a petition, motions, arguments, and orders. There was one affidavit but it contains no

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[60]*Ex parte Lipscomb*, 398 S.C. 463, 469, 730 S.E.2d 320, 323 (Ct. App. 2012); *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 606, 790 S.E.2d 430, 433 (Ct. App. 2016)

[61]*Goolsby v. Goolsby*, 229 S.C. 101, 111–12, 92 S.E.2d 57, 62 (1956)

[62]*State v. Binnarr*, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012)

[63]Record, pp. 15-16, Order dated October 31, 2016.

[64]Brief of Respondent, *Standard of Review*, p. 7, citing *State v. Morris*, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015).

[65]Brief of Respondent, *Standard of Review*, p. 7.

substantive facts. “[T]he appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error.”[66] Interestingly, *Flowers*, is also a Fourth Amendment case. “Contrary to petitioner's claim, *Brockman* does not hold the appellate court may not conduct its own review of the record to determine whether the trial judge's decision is supported by the evidence.”[67]

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[68] and fantasies with a PPG, a tool found unacceptable by many courts because of its undocumented reliability with a high rate of false positives and false negatives.

The State argues the PPG testing requires, “balancing the intrusion on the individual’s Fourth Amendment interests against its promotion of governmental interests.”[69] A balancing requires consideration of Dr. Gehle’s unrebutted report on the one hand and the PPG on the other. What do we know about the PPG and its intrusiveness? See Brief of Appellant, pp. 20-22.

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),

Self-Incrimination

The State argues Tyler has no Fifth Amendment protection because the SVPA because the proceedings are civil, not criminal, and provide treatment, not punishment.[70]

Citing *Allen*,[71] The State argues the Fifth Amendment does not apply to sexually violent predator cases. Allen is distinguishable.

- The South Carolina act is punitive in both purpose and effect and is thus criminal in nature.
- If South Carolina had any interest in providing care and treatment to Tyler, it had ample opportunity do treat him while he was serving his sentence.
- In Allen, the defendant had the right to “apply for release at any time” and could be released “after the briefest time in confinement.” In South Carolina, a defendant may only apply for release after an annual review.[72]

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[66]*State v. Flowers*, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004), citing State v. Green, 341 S.C. 214, 219 n. 3, 532 S.E.2d 896, 898 n. 3 (Ct.App.2000) (citing State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000)).

[67]*State v. Khingratsaiphon*, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002).

[68]*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.”

[69]Brief of respondent, p. 14, first paragraph.

[70]Brief of Respondent, p. 17.

[71]People v. Allen, 1 07 Ill. 2d 9 1 , 4 8 1 N .E .2d 690, 696 (1 985), aff’d sub nom. Allen, 478 U . S . at 367.

[72]S. C. Code Ann. § 44-48-110

- Allen dealt with questioning only; it did not involve a PPG. Tyler never refused to answer questions. He consented to a long interview with Dr. Gehle and consented to a battery of tests, other than the PPG with Dr. Gottfried.

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.

"[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling."[73] If *Rochin* sets the floor, the PPG is subterranean.

Necessity of Test, Qualified Expert, and Compelling State Interest

The State argues, "Compliance with testing deemed necessary by a qualified expert does not violate the Fourteenth Amendment because the testing is rationally related to a compelling State interest."[74] This argument rests up assumptions unsupported by testimony or the record.

- Dr. Gottfried did not testify. Her affidavit does not demonstrate her qualifications. Tyler had no opportunity to cross-examine her regarding her qualifications.
- Dr. Gottfried states, as part of the evaluation, "one of the assessments administered to Mr. Tyler would be the Penile Plethysmograph."[75] She did not state the PPG was necessary nor does she state the other assessments she would administer. She does not explain why she did not administer the other assessments or why the PPG must be first. Tyler had not opportunity to cross-examine her on these subjects.
- Dr. Gottfried does not explain why the PPG "is rationally related to a compelling State interest." There is no explanation why Dr. Gehle in *Snow*[76] and Dr. Berg in *Matthews*[77] did not require a PPG to reach their findings.

"On review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding."[78] There is no evidence Tyler suffers from "a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."[79] On May 16, 2016, Dr. Gehle issued her report concluding. "Larry James Tyler does not meet criteria to be considered a sexually violent predator."[80] The State's other expert, Dr. Gottfried, conducted no examination of Tyler when he refused the PPG nor does she explain why she did not use other evaluation

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

[74]Brief of Respondent, p. 18.

[75]Record, p. 266, Affidavit of Dr. Gottfried, ¶ 4.

[76]*Matter of Snow*, 425 S.C. 544, 549, 823 S.E.2d 467, 469 (2019)

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

[78]*Care & Treatment of Chandler v. State*, 382 S.C. 250, 256, 676 S.E.2d 676, 679 (2009)

[79]S. C. Code Ann. § 44-48-30(1)(b).

[80]Record, p. 264, Forensic Psychological Evaluation (just above signature).

tools to which Tyler consented,"[81] such as the Static-99R, "an instrument designed to assist in the estimation of sexual and violent recidivism for sexual offenders. It is the most widely used measure of sexual recidivism."[82]

Also, the statute guarantees the right to a speedy trial.[83] Citing § 44-48-90(B), Tyler moved for "a trial date be set at the parties' earliest availability."[84] Due process requires a speedy trial.

Tyler was denied due process of law under the United States Constitutions Amendments IV, V, and XIV and the South Carolina Constitution Articles I, §§ 3 and 10.

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."[85] 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 PPG.

ADMISSIBILITY

The State argues, "The issue of admissibility is not ripe because the SVPA proceedings have not reached the point of a civil commitment trial."[86]

Tyler does not intend to argue inadmissibility (but concedes his Brief may be viewed as arguing inadmissibility). He notes the State's Return to Motion[87] contains "inadmissible authority from other cases in the court of common pleas."[88] He also compares the PPG to the inadmissable polygraph for the purpose of showing the unreasonableness of the PPG.[89] To support the lack of reliability of the PPG, he cites cases stating the PPG is admissible "because there are no accepted standards in the scientific community.[90] He argues he "may be incarcerated for life for refusing a test whose results are inadmissible."[91]

The intent was to argue the barbarity and lack of reliability of the PPG.

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[81]Record, p. 266, Affidavit of Emily D. Gottfried, Ph.D.

[82]Record, p. 208, Dr. Gehle's Forensic Psychological Evaluation, second sentence under Risk Assessment.

[83]S. C. Code Ann. § 44-48-90(B).

[84]Record, p. 15, ¶ II, p. 151, ¶ 6 and p. 152, last paragraph, Defendant's Motion to Dismiss, or Alternatively Set Date Certain for Trial.

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

[86]Brief of Respondent, p. 22.

[87]Record, pp. 153-167,

[88]Brief of Appellant, p. 9, Statement of the Case.

[89]Brief of Appellant, pp. 16-17.

[90]Brief of Appellant, pp. 27-28.

[91]Brief of Appellant, p. 26.

The State did well on its admissibility argument on ripeness, but its argument for admissibility fails. The State may produce expert testimony but must first show the witness is qualified[92] and "the substance of the testimony must be reliable."[93] There is a lot of authority regarding the unreliability of the PPG: Glanzer, Powers, Kirk, and Spencer, all quoted and cited in the Brief of Appellant.[94]

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).[95]

"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."[96] Neither a return to motion nor a motion is an accusation (a formal charge of criminal wrongdoing),[97] nor pleading (complaint, answer, or reply to counterclaim)[98] is an affidavit (a sworn written statement),[99] "The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect."[100]

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 PPG. 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

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[92]Rule 702, SCACR

[93]*Ray v. City of Rock Hill*, 428 S.C. 358, 370, 834 S.E.2d 464, 470 (Ct. App. 2019), reh'g denied (Nov. 22, 2019).

[94]Brief of Appellant, p. 27.

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

[96]79 C.J.S. *Contempt*, § 90.

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

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

[99]""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).

[100]*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.

> 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."[101]

BURDEN OF PROOF

The burden of proof for a finding of civil contempt is by clear and convincing evidence.[102] 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]"[103] and Dr. Gehle's report concluded "[Tyler] did not meet the criteria to be considered a sexually violent predator" and nothing suggested he did not cooperate with her evaluation.[104]

"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."

IV

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

The State responded to this argument in its brief as Argument III so the appellant addressed it in this brief under Argument III.

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's appellate lawyers did not receive the Order of Continuance until after the initial Brief of Appellant was served. The State is correct on this point and this argument is abandoned.

VI

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

The State did not address this argument in its brief.

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

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

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

[104]Record, page 12 , Order (denying dismissal) dated September 16, 2016 , ¶ 4.

CONCLUSION

Maybe, as The State suggests,[105] the issues are relatively simple.

- Does the Bill of Rights apply to all citizens?
- Must the trial court and The State afford an accused due process of law in a contempt proceeding?
- Is the PPG required by any statute, rule of court, or other authority?

The appropriate remedy is reversal.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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[105]Brief of Respondent, p. 8, footnote 4.