

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF RONALD MJ GREGG,

APPELLANT.

APPELLATE CASE NO. 2019-001954

RECORD ON APPEAL

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CLOSING BY MR. BOGLE

1 have got to decide.

2 You have got to listen, as you have done, to the
3 extensive testimony given by two very qualified people that
4 have been doing this, both of them, for a very long time.
5 They are good at their jobs. But there are some distinct
6 differences in what you heard.

7 At the same time - and the judge may tell you this - but
8 just because they are expert witnesses does not mean you have
9 got to believe every single word they say. You have got to
10 treat them like any other witness and you decide how much
11 credibility to give to what portion or portions or entirety or
12 none of their testimony.

13 There was some talk about investigation, should you as an
14 expert, Dr. Gottfried, talk to the victim, reach out to the
15 cops, talk to the prosecutor, find out why that case was
16 handled the way it was.

17 Well, that is not her job. And it wasn't Dr. Gehle's
18 job. Dr. Gehle said nothing about reaching out to victims,
19 talking to the prosecute. Their job is to deal with the facts
20 they are given, the record and the offenses.

21 The interview is given at the time when these things
22 happen. The things that the respondent might have said to the
23 police at this time and the things he is saying to them right
24 now. That is their job.

25 Also in some cases I think there have been -- and Dr.

CLOSING BY MR. BOGLE

1 Goffried mentioned this, forensic interviews by trained
2 professionals of the little girls as to what happened to them.
3 And that is important for her to look at.

4 Now both doctors came up with an identical diagnosis.
5 They both found a personality disorder called antisocial
6 personality disorder.

7 And what is that based on? It is based on by my count
8 there were 25 different interactions with the police between
9 1987 and 2006. Twenty-five times he was either arrested or
10 convicted. In some cases we don't know the outcomes, and in
11 some cases we do.

12 But 25 times each interaction with the police supports
13 that diagnosis of antisocial personality disorder that a
14 person is not obeying the rules of society, the interactions
15 with the police whether they were convicted or not. And that
16 was supported by both experts. They came up with the same
17 diagnosis. So we have that.

18 And Dr. Gottfried -- and I think Dr. Gehle too. But Dr.
19 Gottfried was looking for a pattern of behavior. And to do
20 that she had to look at every sexual interaction he had with
21 the police. For example, there was the 1995 criminal sexual
22 conduct with a minor. He wasn't convicted. The case got
23 dismissed. It is over with.

24 But at the same time she has got to look at the facts is
25 is there something that happened there that might suggest a

CLOSING BY MR. BOGLE

1 pattern. Dr. Gehle noted that she looked at the same thing
2 and she couldn't find anything coercive. And I asked her,
3 well, the victim according to the reports was saying please
4 stop and yet he kept going, wouldn't that by definition be
5 coercive.

6 There was also the 1998 criminal sexual conduct with a
7 minor. This involved a nine-year-old child. And again the
8 case got dismissed. There never was a conviction. And I
9 think both doctors equally gave it the appropriate weight.

10 But at the same time was it coercive? And I think by
11 definition using your common sense how could a nine-year-old
12 give the consent to sex of anything or it not be coercive.

13 And then we have the cases where he was convicted. You
14 will have these back in the jury room. Read them. Read the
15 indictment. Read the sentence. See what he did.

16 These cases involved young girls, okay. Underage girls,
17 14; something like that. They involved manipulations. In
18 some cases threats or potential violence. Him impersonating a
19 police officer, wearing that Department of Corrections type
20 shirt with a badge on it. And one of the cases involved a
21 little girl. So you have the pattern there again.

22 And again Dr. Gottfried is looking for some kind of
23 pattern of coercion. Because remember she had a diagnosis.
24 Her diagnosis was other specified paraphilic disorder. And
25 paraphilic means a deviant sexual behavior. And it was

CLOSING BY MR. BOGLE

1 coercive sexual behavior.

2 And one thing she used to find that, she was looking for
3 data points. She gave a lot of tests to this guy. And one of
4 them, that first one, was to measure whether or not he might
5 suffer from ADHD.

6 You might think what does that have to do with sexual
7 reoffending. But remembers her explanation. She has got to
8 know from the beginning can this guy concentrate, can he read,
9 can he listen, can he understand. Okay, and so if she can
10 rule that out as knows that he can she can then proceed with
11 the other tests, some of which require a lot of study, a lot
12 of testing, a lot of reading. So she does that.

13 The PPG, the penile plethysmograph, PPG was found to be
14 reliable in this case. It was used by her. And what is she
15 looking for there? He is denying every sex offense to her.
16 Didn't to it. Okay. Yet she is seeing a pattern of behavior
17 of coercion.

18 So he might say one thing, but his body can't lie. On
19 the PPG she shows him a series of little skits or plays,
20 pictures with audio to see if he gets aroused to it. And
21 eight -- was it eight out of ten times, I think that was the
22 number -- eight out of those ten of those little plays that
23 she saw he gets sexually aroused to it. So -- and they were
24 coercive. Eight out of the ten that he was aroused to
25 involved coercive behavior. So his body can't lie. He says

CLOSING BY MR. BOGLE

1 one thing. His body responds to something else. And so that
2 reinforced her diagnosis.

3 Others testified paraphilic disorder, coercive behavior,
4 that is the mental abnormality. So she found both the mental
5 abnormality, and the personality disorder that Dr. Gehle
6 found.

7 As far as the respondent's testimony, he apparently did a
8 great job in prison. He did what we are supposed to do. He
9 did get in trouble, a minor violation; he had to be out of
10 place. That is not a big deal, not at all. And you are not
11 supposed to do anything, but that is not a big deal.

12 He also went through a lot of courses. But let me ask
13 you this: Did you hear any testimony by him that any of those
14 courses had to do with sex offender treatment? And as good as
15 they were and as valuable as they might have been to his
16 character, they did not involve that topic. And both doctors
17 testified they could find no record of him getting sex
18 offender treatment in the ten to twelve years he was at the
19 Department of Corrections.

20 What about static risk factors. We have the Static-99R.
21 Both doctors agree it is a commonly used thing to assess
22 whether a person is likely to reoffend sexually. So if you
23 have a number of the things -- it is not saying you are going
24 to reoffend, but people like you, studies of thousands of sex
25 offenders, if they have these things they are more likely to

CLOSING BY MR. BOGLE

1 reoffend.

2 Just like if I go to the doctor and I am worried about my
3 health and I am having chest pains, he take my blood pressure,
4 no problem there. He finds I don't exercise, he finds there
5 is a history of heart disease in my family. Then he is not
6 going to say I am going to have a heart attack. But because
7 of that history and the studies of thousands of people with
8 those symptoms, I am likely to have one. And that is what
9 this is.

10 His score on the Static-99 was high. It was a five. The
11 low is minus three; the high is twelve. He got a five.
12 Fifteen percent chance of reoffending in five years. And you
13 have got to put that in perspective.

14 I know you might be thinking, okay, the State has got to
15 prove this case beyond a reasonable so why isn't it 50 percent
16 or 60 percent, where that is only 15. But look at it in
17 perspective. It is a 15 percent chance of committing another
18 sexually violent crime; not robbing a convenience store,
19 stealing a chocolate bar or something like that. It's the
20 type of crime involved.

21 He is 2.7 times more likely, twice as likely apparently,
22 to commit another sexual violent -- sexual offense as an
23 average sex offender.

24 So the Static-99 both doctors agree it is in important
25 tool in assessing risk to reoffend.

CLOSING BY MR. BOGLE

1 Dr. Gehle also looked at dynamic risk factors. I talked
2 about those when I cross-examined her. You remember what
3 those were. Things that are changeable. But he has them. He
4 has them, just like Dr. Gottfried found.

5 Dr. Gehle said he wasn't a psychopath. But she did not
6 administer the Hare psychopathy test like Dr. Gottfried did.
7 And Dr. Gottfried found he wasn't a true psychopath but he had
8 some of the traits of one. She couldn't diagnose him as that,
9 but he had some of the traits.

10 So there we are. We have got the exhibits. We have
11 heard the evidence. Again, the burden of proof is beyond a
12 reasonable doubt. It is a much higher burden. And it should
13 be. Because Mr. Gregg's liberty is at stake.

14 I would submit to you the State has indeed proven their
15 case. We have got the convictions. We have got the mental
16 abnormality confirmed by the score on his reaction of the PPG,
17 coercive sexual disorder. We have also got the antisocial
18 personality disorder that both experts agreed upon. And we
19 have got him likely to reoffend.

20 So I would ask that you return a verdict for the State.
21 Thank you.

22 Your Honor.

23 THE COURT: Do you want to take that quick break?

24 MR. FALK: Yes, Your Honor.

25 THE COURT: Mr. Foreman, ladies and gentlemen, we are

CLOSING BY MR. BOGLE

1 going to take a very brief recess of about five minutes.
2 During the break please do not discuss the case and please
3 leave your notepads in your seats. After which we will resume
4 argument. We appreciate your patience.

5 (WHEREUPON, jury exits courtroom 11/21/19, 12:02 p.m.)

6 THE COURT: We will take -- it is 12:02. Mr. Gregg's
7 prayers are scheduled at 12:06. Sir, as soon as you are done
8 please let us know and we will resume with argument.

9 (WHEREUPON, break 11/21/19, 12:03 p.m.)

10 (WHEREUPON, resume 11/21/19, 12:16 p.m.)

11 THE COURT: Is the State ready to proceed?

12 MR. BOGLE: Yes, Your Honor.

13 THE COURT: Is the respondent ready to proceed?

14 MR. FALK: Yes, Your Honor.

15 THE COURT: The jury is just outside the door.

16 (WHEREUPON, jury enters 11/21/19, 12:17 p.m.)

17 THE COURT: Ladies and gentlemen, we appreciate your
18 patience. I would ask that you give counsel your undivided
19 attention. You may proceed, Mr. Falk.

20 MR. FALK: Thank you, Your Honor.

21 THE COURT: You are welcome.

22 **CLOSING BY MR. FALK:**

23 I just wanted to I think support and keep in mind in this
24 case while you are doing your deliberations.

25 THE COURT: Can you hear him okay?

CLOSING BY MR. FALK

1 THE COURT REPORTER: If you could speak up.

2 THE COURT: I am going to need you to speak up, Mr. Falk.
3 Thank you.

4 MR. FALK: Let me get some water, please.

5 THE COURT: That's okay. Take your time.

6 (WHEREUPON, pause for water)

7 MR. FALK: Can y'all hear me now?

8 JURY MEMBER: Yes.

9 RESUME CLOSING BY MR. FALK:

10 The number I want y'all to keep in the back of your minds
11 while you are going back into deliberation is the number 107.
12 The reason why I think that number is important is because
13 that is how many of these sexually violent predators'
14 precommitment evaluations Dr. Gehle has done. She is on
15 behalf of the South Carolina Department of Mental Health her
16 job for the last six years has been to be reviewing these --
17 that same type of analysis that she talked about at trial, the
18 same type of thing. Her job in the last six years has been to
19 be reviewing these files and making determinations on who she
20 recommends, you know, put into the sexually violent treatment
21 program and who she doesn't think needs to be there. That is
22 a lot of experience.

23 Dr. Gottfried, a well qualified doctor, but not the same
24 focus experience. She has a broad experience. She is a
25 forensic psychologist. She is at MUSC. I mean there is no

CLOSING BY MR. FALK

1 reason to think that, you know, she is not qualified, at all.

2 Certainly if -- she's not going to be on the staff there,
3 but they do a lot of things over there. I mean she does risk
4 evaluations here and there. She has done nine of these
5 precommitment evaluations. One hundred and seventy versus
6 nine.

7 Now Dr. -- now I will accept the fact that MUSC did
8 conduct a bunch of tests. But a lot of those test weren't
9 really focused on sort of helping us define or differentiate
10 who is a sexually violent predator. I mean if they test
11 whether or not you have attention deficit disorder and whether
12 or not you have a predictive personality.

13 The test that they really sort are basing their opinion
14 on is this PPG test. Dr. Gehle does not think the PPG tests
15 are reliable. Her testimony was that they are commonly not
16 used in sex offender precommitment evaluations. She doesn't
17 think they are reliable.

18 I don't know whether or not they are reliable. But I
19 content that I don't think MUSC really knows whether or not
20 their tests are reliable because they have never submitted the
21 results from their testing to any type of peer-reviewed study.
22 The -- I think there was some talk about a poster board and a
23 presentation, but I am not even sure MUSC really knows if they
24 are reliable.

25 And you have to remember though there is a lot at stake

CLOSING BY MR. FALK

1 here in using this test. There is a lot at stake. I mean if
2 you are basing this on the PPG and you are going to send
3 somebody to the sex offender program based on the PPG, you
4 better hope that the test is reliable. I don't know if it is
5 reliable. It was certainly admitted into evidence and you
6 were certainly able to consider it for whatever purpose.

7 MUSC did give him a bunch of tests. And, you know, she
8 did -- I thought it was interesting is that she gave him this
9 test, this PRT test which was this visual reaction time. And
10 I think what it does is that it tests -- you know, they show
11 you picture and if your eyes are kind of sort of following the
12 picture more looking at one picture versus another that was
13 somewhat of you have sexual interest.

14 But what I think Dr. Gottfried's testimony was
15 interesting was that she wasn't really sure -- she had
16 questions about the validity of that test and the reliability.
17 I mean she didn't know, but she gave him the test anyways.

18 Also what I think is interesting is that test certainly
19 did -- her response was that test did not show any deviant
20 sexual interest of his responses on that test.

21 The problem with these cases is what you always have to
22 do is you have to look at their record. And a lot of these
23 guys are going to have bad records. And it is very easy to
24 read this record, you know, that has been generated over a
25 period of time. There is no question my client has had a lot

CLOSING BY MR. FALK

1 of run ins with the law. And I mean he has antisocial
2 personality disorder. He might not be the most agreeable
3 person to be with.

4 But what is important is today -- I guess today is
5 November 21st, whatever, is, is he a sexually violent predator
6 today. That is what you have to worry about. Not everything
7 in the past. It is who is this man today.

8 You got a glimpse of who he was today when he was up on
9 the stand. I mean you saw a man who testified that he wasn't
10 wasting time while he was in prison. He was doing whatever he
11 could to better himself. He was taking classes and he was
12 learning stuff about himself.

13 We also noted that, you know, he got to go to these
14 character bars; you know, he got perks from his behavior while
15 at SCDC. And I think that is important to focus on.

16 I mean, you know, it is a long period of time in
17 confinement where there are whole bunch of rules and there are
18 a whole lot of deprivations. You don't get a lot of stuff.
19 So you get a lot of people who are going to pick up offenses
20 for contraband. I mean in prison contraband can be, you know,
21 six extra packages of sugar. I mean it is very highly
22 regulated. But he did not get in trouble while he was in
23 prison.

24 There might really be an explanation. Because both Dr.
25 Gottfried and Dr. Gehle acknowledged that if you have

CLOSING BY MR. FALK

1 antisocial personality disorder -- I mean that is a
2 personality defect that is going to hang with you the rest of
3 your life. I mean Dr. Gehle said that is still the lens you
4 have to look through. But they all also acknowledged that
5 once you get into your 40's and, you know, moving on from that
6 that the tendency to sort of act out on your antisocial
7 personality and do those things sort of starts to wane. It
8 starts to dismiss.

9 I think it was Dr. Gottfried's testimony that it's, you
10 know, they just don't have any energy. I mean it is just they
11 don't do that kind of stuff anymore. And that is maybe what
12 we are seeing over this period of time when he does not get
13 into prison.

14 If you are -- I am sure there are plenty of ways to get
15 in trouble in prison while you are there. And he didn't. The
16 one thing that I was really kind of struck by -- because I can
17 really appreciate this, is that he took a mental health class
18 while he was in the Charleston County Detention Center.

19 I mean there are a lot of prison classes. And I respect
20 him for taking those prison classes. But while he is waiting
21 for this trial to go he is taking another mental health class.
22 I commend him for that.

23 I do think it takes a little bit away from, you know,
24 where -- you know, the State is talking about all this other
25 battery of tests that she gave him. And none of them other

CLOSING BY MR. FALK

1 than the PPG really had anything bad to say about him.

2 But you will remember she talked about the PAI which is
3 the personality assessment inventory. When she sort of went
4 through all of that, you know, her result -- the worst thing
5 she could say about him was that he probably wasn't likely to
6 want to seek treatment. I think that is what her words here.

7 And you saw a man -- I mean it's -- she -- he had already
8 done all this treatment in prison; and now he is taking more
9 treatment, you know, in jail while he is waiting for this
10 trial. I think that is a man -- you know, he clearly wanted
11 to seek treatment. He is not unlikely to seek it. He clearly
12 sought treatment during this time.

13 And what I want you to think about is does that somehow
14 detract from sort of the precision of Dr. Gottfried's
15 diagnosis and Dr. Gottfried's testing that she did, how
16 reliable a test it is.

17 The State wants -- really wants you to focus on these
18 nolle pros charges, these charges that were dismissed.
19 Because they really sort of help support Dr. Gottfried's
20 diagnosis.

21 And I asked Dr. Gehle why she doesn't do that. And she
22 uses them where she is, you know, sort of supposed to. I mean
23 every brush with law-enforcement, every arrest that is
24 meaningful as far as reaching a diagnosis of antisocial
25 personality disorder. But she is very hesitant to use it to

CLOSING BY MR. FALK

1 sort of base her diagnosis. And that is what we are worried
2 about here, her, you know, diagnosis. Other than whether or
3 not it is, you know, being in front of law-enforcement a lot,
4 it is all relevant, it is all relevant for an anti-social
5 personality disorder.

6 But some type of diagnosis on the sexual disorder she is
7 hesitant to use that because she thinks that is not fair to
8 use that because people are innocent unless they were proven
9 guilty. Obviously I agree with that.

10 But what is important to think about though is what we
11 do -- we are able to glean about the accuracy of those
12 charges. The 1998 charge Dr. Gottfried testified that the
13 charges were dropped -- and this is the one with the nine-
14 year-old girl that, you know, she was sort of focusing on.

15 He was in jail. They set a high bond. Obviously you are
16 going to set a high bond when you're -- when there's concerns.
17 They lowered his bond because he had a legitimate alibi or had
18 a verifiable -- or strong alibi is what I think it is.

19 And that would -- should focus you all on the problem
20 with taking the diagnosis in a case like this where somebody's
21 liberty is at stake and saying, well, he did that to the nine-
22 year-old girl, just because the case didn't go forward, he did
23 that to the nine-year-old girl, he is a bad guy; he had an
24 alibi. That is why Dr. Gehle is concerned about being fair.
25 Because if you put a lot of focus on a case where somebody has

CLOSING BY MR. FALK

1 an alibi, he didn't do it.

2 But that a lot of what she was talking about really sort
3 of -- the coerce and all of that, the little girl is nine he
4 had an alibi for that -- for that offense.

5 Now what I really think, Dr. Gehle's opinion -- and it is
6 kind of complicated. It's he has -- he has a personality
7 defect. He has antisocial personality disorder. So the same
8 thing that Dr. Gottfried said.

9 But this is a case that is kind of nuance I guess is the
10 best way to say it. Because she is saying that, yeah, he has
11 an antisocial personality disorder, that is a personality
12 defect; but that is not what would be driving any kind of
13 sexually violent offenses.

14 And maybe that's -- you can reach that opinion after you
15 have been doing this for six years. And that is sort of
16 complicated: Yeah, he has got this disease but no he is not
17 likely to reoffend with a sexually violent offense.

18 He may reoffend with something else. But our focus here
19 today is whether or not he is going to commit a crime of
20 sexual violence if he is not -- if he is not confined.

21 Dr. Gehle has the experience to sort through all of the
22 facts and so to look to see, well, yeah, he did have but
23 that's -- she didn't think that was going to happen.

24 It is a nuanced opinion. It is complicated. It is hard
25 in a case like this for jurors, because you are still going to

CLOSING BY MR. FALK

1 want to punish Mr. Gregg for what he has done. But that is
2 not your job. Your job is determine whether or not you think
3 he has a mental disease.

4 It is a little bit like the analogy I gave to Dr. Gehle;
5 it is the, you know, did he go and steal something because he
6 needed food or he wanted food or did he go and steal something
7 because he is a kleptomaniac, kleptomania, because of a mental
8 disease and he has a criminal background.

9 Likely to reoffend, 15.2 percent likelihood to reoffend.
10 He fits in a category of people that are 15.2 percent likely
11 to reoffend over the next five years. It is not saying that
12 he is. He is saying people with a similar score will do that.
13 Kind of an actuarial table.

14 And then they were sort of focusing on this 2.75 percent
15 more likely to reoffend than the average sex offender. Well,
16 I think that is kind of -- that kind be kind of -- I think a
17 lot of people think that somebody who has committed a crime of
18 sexual violence is going to do it again, is going to do it
19 again, is going to do it again, and they have a high
20 re-offense rate, so if somebody does it two-and-a-half times
21 more than a normal person then that is really high. But a
22 routine sex offender has a re-offense rate of five percent.
23 So 2.75 times five is the 15.2 or whatever. I am bad with
24 math, especially on one hand. I could count on my feet like
25 that. But it's -- you have to decide whether that is likely.

CLOSING BY MR. FALK

1 Is that a likely -- is that likely to reoffend. Another way
2 to say it, it is 85 percent not likely to reoffend.

3 And I think also knowing that this -- the re-offense
4 pattern with somebody who has antisocial personality disorder,
5 you know, acting out based on his antisocial personality
6 disorder sort of that goes down the more you age.

7 And you saw the man when he was testifying. He is a
8 different guy. At the end of the day, you know, the chief
9 psychologist -- or one of the chief psychologists from South
10 Carolina Department of Mental Health, she is testifying today
11 it is her opinion that he does not need to be committed to the
12 Sexually Violent Predator Treatment Program.

13 So why send somebody to the Sexually Violent Predator
14 Treatment Program that is under the authority of the South
15 Carolina Department of Mental Health? It just doesn't make
16 any sense. The South Carolina Department of Mental Health,
17 their expert says he doesn't need to be there, we are going to
18 send him there anyway.

19 I don't know what they are going to do. We don't think
20 he needs to be there in the first place.

21 I think at the end of the day I am hopeful that you all
22 will consider this, will think about the fact that you are not
23 worried about trying to punish him for what he has done in the
24 past, that we are just trying to determine whether or not he
25 has got -- has an abnormality, personality defect, that is

CLOSING BY MR. FALK

1 going to make him likely to commit a crime of sexual violence
2 if he is not confined to treatment.

3 I think when you saw Mr. Gregg on the stand you saw a man
4 who is not a threat. I think he has got his time in prison.
5 That sort of proves that is not -- that he is not a threat. I
6 am hopeful that you will find that he is not a sexually
7 violent predator.

8 Thank you.

9 THE COURT: Any rebuttal argument?

10 MR. BOGLE: Very briefly, Your Honor.

11 THE COURT: You may proceed.

12 MR. BOGLE: Thank you.

13 THE COURT: You are welcome.

14 **REBUTTAL ARGUMENT BY MR. BOGLE:**

15 Numbers were brought up, and I will just make one comment
16 about that. The numbers of evaluations someone has done,
17 again, we had two excellent expert witnesses. They know they
18 job. Both of them do.

19 You have got to look at what to believe. And what my
20 suggestion is, it's not the number of cases you have done; it
21 is the job you did on this one.

22 Another way to look at numbers is the number of tests or
23 assessments that were done. One, the Static-99R, like Dr.
24 Gehle did, are eight. Is it logical that a loved one or a
25 person important is going to see - important to you - is going

1 to see a doctor about something and run one test or run eight?

2 Thank you.

3 THE COURT: Mr. Foreman, ladies and gentlemen, of the
4 jury, you have heard the evidence and the arguments of both
5 parties. I am now going to explain to you the law which
6 applies to this action.

7 Could y'all move that podium for me, please.

8 (WHEREUPON, podium removed)

9 THE COURT: Thank you. I appreciate it.

10 **CHARGE ON THE LAW:**

11 THE COURT: Under our Constitution and code of laws only
12 you the jury can make the findings of fact in this case. I am
13 not permitted to indicate how I might feel about the testimony
14 and evidence which has been presented. And throughout this
15 trial, ladies and gentlemen, it has been my intention to be
16 fair and impartial toward each of the parties involved as well
17 as counsel.

18 The State has brought this action under what we call the
19 Sexually Violent Predator Law of the State of South Carolina.
20 The State seeks the civil commitment of Mr. Ronald MJ Gregg,
21 the respondent, for long-term control, care, and treatment in
22 a secure facility.

23 This is not a criminal proceeding seeking incarceration,
24 but it is a proceeding seeking a civil commitment. The State
25 of South Carolina alleges that the respondent, Mr. Ronald MJ

CHARGE ON THE LAW

1 Gregg, is a sexually violent predator under the law.

2 The respondent denies that he is a sexually violent
3 predator, and the burden therefore is on the State to prove by
4 evidence satisfying you beyond a reasonable doubt that Mr.
5 Gregg is in fact a sexually violent predator. If the State is
6 unable to meet the burden to proof as to one or more of the
7 elements of this claim the respondent is entitled to a finding
8 that he is not a sexually violent predator.

9 Ladies and gentlemen, I instruct you that Mr. Gregg is
10 not accused of committing a crime in this proceeding. You
11 have heard testimony that he did have previous charges for
12 which he was sentenced by the Court. The respondent has now
13 completed his sentence for those charges and the State is now
14 alleging that Mr. Gregg is a sexually violent predator.

15 The State has the burden of proof in this case and must
16 prove its case beyond a reasonable doubt. If you find that
17 the State has not met this burden of proof, the respondent
18 will be released. If you find that the State has met its
19 burden of proof and find that the respondent is a sexually
20 violent predator, he will be committed to a secure treatment
21 facility in Columbia operated by the South Carolina Department
22 of Mental Health.

23 During this trial, ladies and gentlemen, you and I have
24 certain duties to perform. As the trial judge is my
25 responsibility to preside over the trial of this case. And I

CHARGE ON THE LAW

1 also have the duty to rule upon or pass upon the admissibility
2 of evidence which has been offered during the progress of this
3 trial.

4 You are to consider only the competent evidence that is
5 before you, and you are to disregard and disabuse from your
6 mind any testimony or other -- or otherwise that has been
7 ordered stricken from the record in this case during the
8 progress of this trial if there has been any.

9 You are to consider only the testimony which has been
10 presented from the witness stand, from the sworn witnesses,
11 together with any exhibits which have been made a part of the
12 record in this case.

13 I have the additional duty to charge or instruct you on
14 the applicable law of this case. And when you hear me use the
15 term charge that is a legal term of art that simply means
16 instructions. They are interchangeable words in that context.

17 And in that regard, I am the sole judge of the law of
18 this case. It is your duty as jurors to accept and apply the
19 law precisely as I now state it to you.

20 It you have a preconceived ideas as to what the law is or
21 what the law should be in this case and it does not agree with
22 what I now tell you the law if, you are obligated under your
23 oath to abandon this preconception on your part because you
24 are sworn to accept the law and apply the law precisely as I
25 now state it to you.

CHARGE ON THE LAW

1 Again, ladies and gentlemen, you are the sole and
2 exclusive judges of the facts in this case. The Court is the
3 judge of the law. Please do not infer anything that I have
4 said during the course of this trial in ruling upon the
5 admissibility of evidence or otherwise or anything that I say
6 now to you during the course of this instruction that I have
7 any opinion about the facts. Our state constitution does not
8 allow a trial judge to have an opinion about the facts.

9 As jurors then it is your duty, as I have instructed, to
10 determine the effect, the value, the weight, and the truth of
11 the evidence presented during the course of this trial.

12 I further instruct you that while argument of counsel is
13 a beneficial part of every trial, you should remember that the
14 statements made by counsel are not evidence.

15 In presenting arguments counsel often refers to the
16 evidence; however, you should base your verdict on the
17 evidence as you remember it. Therefore, if there are any
18 conflicts between the recollection of counsel about the
19 evidence and your own recollection you should rely upon your
20 own understanding of the evidence.

21 Ladies and gentlemen, in most civil cases tried in the
22 Court of Common Pleas the burden of proof is the preponderance
23 or the greater weight of the evidence.

24 In other words, it means -- it is equivalent to the term
25 meaning more likely than not. However, in this case the

CHARGE ON THE LAW

1 statute requires that the State's proof and burden of proof is
2 greater than that. It is proof beyond a reasonable doubt.

3 And as I have instructed, the State has the burden of
4 proof beyond a reasonable doubt. Under the law of this case
5 of the State according to the Sexually Violent Predator
6 statute the State must prove its case to the standard of proof
7 beyond a reasonable doubt. If the State fails to meet this
8 burden then you must find that Mr. Gregg is not a sexually
9 violent predator.

10 Proof beyond a reasonable doubt is proof that leaves you
11 firmly convinced that the respondent is a sexually violent
12 predator.

13 There are very few things in this world that we know with
14 absolute certainty. And in this case the law does not require
15 proof that overcomes every possible doubt. If based on your
16 consideration of the evidence you are firmly convinced that
17 Mr. Gregg is a sexually violent predator then you must return
18 a verdict in favor of the State. If on the other hand you
19 think there is a real possibility that Mr. Gregg is not a
20 sexually violent predator you must give him the benefit of
21 that doubt and return a verdict in his favor finding that he
22 is not a sexually violent predator.

23 Ladies and gentlemen, there are two types of evidence
24 which are presented during a trial, direct evidence and
25 circumstantial evidence.

CHARGE ON THE LAW

1 Direct evidence is the testimony of a person who asserts
2 or claims to have actual knowledge of a fact such as an eye
3 witness. Circumstantial evidence is proof of a chain of facts
4 and circumstances indicating the existence of a fact.

5 The law makes absolutely no distinction between the
6 weight or value to be given to either direct or circumstantial
7 evidence. Nor is a greater degree of certainty required of
8 circumstantial evidence than of direct evidence. You should
9 weigh all of the evidence in this case.

10 And as I have explained, there are two types of evidence
11 which are generally presented during a trial, direct evidence
12 and circumstantial evidence.

13 Again, direct evidence directly proves existence of a
14 fact and does not require deduction. Circumstantial evidence
15 is proof of a chain of facts and circumstances indicating the
16 existence of a fact.

17 The State's case may be proven by circumstantial
18 evidence. The law makes no distinction between the weight or
19 value to be given to either direct or circumstantial evidence.
20 However, to the extent the State relies on circumstantial
21 evidence all of the circumstances must be consistent with each
22 and when taken together point conclusively to proof beyond a
23 reasonable doubt. If these circumstances merely portray the
24 respondent's behavior as suspicious the proof has failed.

25 The State has the burden of proving their case beyond a

CHARGE ON THE LAW

1 reasonable doubt. This burden rests with the State regardless
2 of whether the State relies on direct evidence, circumstantial
3 evidence, or some combination of the two.

4 To determine the facts in this case, ladies and
5 gentlemen, you will have to evaluate the credibility, which
6 simply means -- which credibility is simply a legal term
7 meaning the believability of each witness.

8 Some of the things you may consider as you decide whether
9 or not to believe a witness's testimony about a particular
10 matter include: What was the manner or appearance of the
11 witness who testified. Was he or she straightforward or
12 hesitant in answering. Was the testimony of a witness
13 consistent or inconsistent. How did the witness come to know
14 the things that he or she testified to or what was his or her
15 ability to know these facts. Is there some reason a witness
16 would want to give testimony which would help or hurt one side
17 or the other. In other words, was the witness biased or
18 prejudiced. And was the testimony of a witness strengthened
19 or weakened by other testimony or evidence.

20 I further instruct you that in determining the
21 believability or credibility of witnesses who have testified
22 you may believe one witness as against several witnesses or
23 several witnesses over one witness. You may believe a part of
24 the testimony of a witness and reject the remaining part of
25 the testimony of that same witness. You may believe the

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1 testimony of a witness in its entirety or reject the testimony
2 of a witness in its entirety. As I have instructed, you can
3 believe as much or as little of each witness's testimony as
4 you think proper.

5 You may also consider the way the witness acts on the
6 witness stand or what we commonly refer to as their demeanor.

7 Again, ladies and gentlemen, you can believe as much or
8 as little of each witness's testimony as you think proper.
9 And you do not determine the truth merely by counting the
10 number of witnesses presented by each side.

11 Throughout this process you have but one objective, to
12 find the facts regardless of their source and apply the law to
13 those facts as you find them.

14 I further instruct you that our rules of evidence
15 ordinarily do not permit witnesses to testify to opinions or
16 conclusions. An exception to this rule exists for witnesses
17 we call expert witnesses, a witness who by their education,
18 training and experience has become an expert in some art,
19 science, profession, or calling may give an opinion as to the
20 subject the witness claims to be -- in which the witness
21 claims to be an expert and may also give the reasons for the
22 opinion.

23 You should consider any expert opinion given by a witness
24 like any other evidence, give it the weight you think it
25 deserves. If you decide that an expert witness's opinion is

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1 not based on sufficient education, training, and experience or
2 if you decide that the reasons given in support of the opinion
3 are not sound or that the opinion is outweighed by other
4 testimony in evidence, you may disregard the opinion entirely.

5 An expert witness's testimony is to be given no greater
6 weight than that of other witnesses simply because the witness
7 is an expert. And you do not have to accept an expert's
8 opinion even though it is uncontradicted.

9 Of course there is no way to weigh evidence except
10 through the exercise of your good common sense and judgment.
11 It is entirely a mental process. And the evidence you should
12 give the most weight to is that which convinces you regardless
13 of from whom or what source it has come.

14 The State has brought this cause of action under the
15 State Sexually Violent Predator Law. The elements which the
16 State must prove beyond a reasonable doubt are: That the
17 respondent has been convicted of a sexually violent offense -
18 I instruct you that criminal sexual conduct with a minor in
19 the second-degree is classified in our state law as a sexually
20 violent offense - and that the respondent suffers from a
21 mental abnormality or personality disorder that makes him
22 likely to engage in acts of sexual violence if not confined in
23 a secure facility for a long-term control, care, and
24 treatment.

25 Inherent in these two elements, ladies and gentlemen, is

CHARGE ON THE LAW

1 that the State must prove the requirement that the
2 respondent's mental abnormality or personality disorder causes
3 him serious difficulty in controlling his behavior. In other
4 words, the State must prove beyond a reasonable doubt that the
5 individual it seeks to commit suffers from a mental illness
6 which he cannot sufficiently control without the structure and
7 care provided by a mental health facility, rendering him
8 otherwise likely to commit a dangerous act.

9 In order for you to better understand the elements of the
10 State's cause of action I am going to define for you some of
11 the terms that I have just used.

12 Mental abnormality means a mental condition affecting a
13 person's emotional or volitional capacity that predisposes the
14 person to commit sexually violent offenses. This mental
15 abnormality or personality disorder must cause Mr. Gregg
16 serious difficulty in controlling his behavior.

17 Likely to engage in acts of sexual violence means the
18 person's propensity to commit acts of sexual violence is of
19 such a degree as to pose a menace to the health and safety of
20 others so that he is dangerous to others.

21 I remind you that the burden of proof is on the State to
22 prove to your satisfaction beyond a reasonable doubt that Mr.
23 Gregg has been convicted of a sexually violent offense, as you
24 have been instructed, and also suffers from a mental
25 abnormality or personality disorder that makes him likely to

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1 engage in acts of sexual violence if not confined in a secure
2 facility for long-term control, care, and treatment.

3 If the State meets its burden of proof and proves to you
4 beyond a reasonable doubt both of the two elements of its
5 cause of action, it is entitled to a finding that Mr. Gregg is
6 a sexually violent predator. If on the other hand the State
7 fails to meet that burden of proof as to one or both of these
8 elements, Mr. Gregg is entitled to a finding that he is not a
9 sexually violent predator.

10 Ladies and gentleman, you have been selected as fair and
11 impartial jurors sworn to impartially try the facts of this
12 case. And when you comply with your oath to do so then you
13 would have fulfilled your duty as jurors and you will have
14 fully discharged your duty as jurors.

15 You should not be influenced by opinions or expressions
16 of opinions, what you may have heard outside of the evidence
17 of this case. But you are to decide this case solely on the
18 evidence that you have heard from the lips of the sworn
19 witnesses and the other evidence that may have been introduced
20 during the trial.

21 Ladies and gentlemen, there are two potential verdicts in
22 this case. And I am going to go over the verdict form with
23 you. And it will go into the jury room with you, so you don't
24 have to try to write any of this down.

25 And it reads as follows: Has the petitioner, the State

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1 of South Carolina, proved beyond a reasonable doubt Ronald MJ
2 Gregg is a sexually violent predator under the South Carolina
3 Sexually Violent Predator Act.

4 We the jury unanimously answer the question as follows:
5 Yes, Ronald MJ Gregg is a sexually violent predator; or, no,
6 Ronald MJ Gregg is not a sexually violent predator.

7 There will be a place for the foreperson to sign and date
8 the form. And likewise knock on the door and advise the
9 bailiffs that the jury has reached a verdict.

10 Ladies and gentlemen, there is no significance whatsoever
11 to the order in which I have stated these potential verdicts.
12 It is simply that one must be stated first. And I further
13 instruct you that in order to reach a verdict it must be
14 unanimous, which means all 12 of you must agree to reach a
15 verdict in this case.

16 Ladies and gentlemen, I instruct you that your verdict
17 cannot be based on sympathy, passion, prejudice, emotion, or
18 any other consideration not found in evidence of this case.

19 Mr. Foreman, when the jury has reached a unanimous
20 verdict it is your responsibility to fill out the verdict
21 form. It is also your responsibility to sign and date the
22 form and knock on the door and advise the bailiffs that the
23 jury has reached a unanimous verdict.

24 Also if the jury has any questions during deliberations
25 it is your responsibility to write those questions out in the

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1 notebook that you have been provided, to sign and date the
2 note, and follow the same process by knocking on the door and
3 advising the bailiffs that you have a question.

4 Any questions from the jury should never indicate a
5 numerical breakdown, as the jury's deliberation should be
6 cloaked within the confines of the jury room and should never
7 be disclosed outside of the jury room.

8 Please know, ladies and gentlemen, if you have any
9 questions during deliberations there will be a delay because
10 there is a process that we must follow in answering your
11 questions.

12 So if you have a question, expect there to be a delay in
13 our response because we are following the procedure that is
14 mandated in answering your questions.

15 Ladies and gentlemen, again, your verdict must be
16 unanimous which means all 12 of you must agree to reach a
17 verdict in this case.

18 I am going to ask that you return to your jury room.
19 Please do not yet begin your deliberations. I have some brief
20 matters of law to take up with counsel that may require
21 further instruction or clarification of an instruction.

22 If there is no further instruction we will send in the
23 evidence, your notepads, and at that time -- and the verdict
24 form and we will excuse the alternate and you will be allowed
25 to begin your deliberations.

CHARGE ON THE LAW

1 Your lunch has arrived. It should be in the jury room.
2 I tell you in advance that once you begin your deliberations
3 if anyone wants to go downstairs and get air you are welcome
4 to do that. A bailiff will have to accompany you during that
5 process. And deliberations cannot be conducted when you are
6 all 12 are not present. So I let you know that in advance so
7 you don't have to ask that so that you know that you are able
8 to do that.

9 If you would go with the bailiffs for me, please. And
10 please leave your notepads in your seats.

11 (WHEREUPON, jury exits courtroom 11/21/19, 12:54 p.m.)

12 THE COURT: You all can take your seats.

13 I realize there were a couple of scrivener's errors on
14 this form and I need to fix it right quick.

15 (WHEREUPON, pause for the Court.)

16 THE COURT: I noticed a couple of scrivener's errors that
17 I corrected. I will let you all look at it one more time.

18 (WHEREUPON, pause for review of form)

19 THE COURT: Are there any exceptions to the charge, from
20 the State?

21 MR. BOGLE: No, Your Honor.

22 THE COURT: From the respondent?

23 MR. FALK: No, Your Honor.

24 THE COURT: All right. Can y'all make sure -- I think
25 there are only two pieces of evidence. Can y'all make sure.

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1 (WHEREUPON, exhibits reviewed by counselors.)

2 MR. BOGLE: Okay. Two pieces of evidence.

3 THE COURT: And go ahead and get their notebooks and put
4 the alternate's notebooks on the banister and get the
5 alternate for me, please.

6 MR. BOGLE: Do you send your charge back?

7 THE COURT: No.

8 (WHEREUPON, alternate jury enters 11/21/19, 12:57 p.m.)

9 THE COURT: Ma'am, we thank you for your time and your
10 attention to this case. I know that being an alternate can
11 seem thankless, but it is such a vital service to the court.

12 You are welcome to discuss this case if you would like,
13 but I ask that you not do that until the entire panel is
14 excused on Friday.

15 THE ALTERNATE: Okay.

16 THE COURT: Your lunch should be here. Did they already
17 give it to you?

18 THE ALTERNATE: No, ma'am.

19 THE COURT: I will make sure they give your lunch to you.
20 If you want to stay here and eat it you are welcome to. But
21 if not, you are welcome to leave. Do you need a work excuse
22 before you leave today?

23 THE ALTERNATE: I would love one.

24 THE COURT: We will make sure you get one before you
25 leave, and your check will be mailed to you. I hope you have

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1 a great day. You are excused with the Court's profound
2 thanks.

3 THE ALTERNATE: Thank you.

4 THE COURT: You are welcome.

5 I need you all to approach to look at the verdict form
6 again for me, please.

7 (WHEREUPON, counselors complied.)

8 THE COURT: Any exceptions from the State?

9 MR. BOGLE: No, Your Honor.

10 THE COURT: From the respondent?

11 MR. FALK: No, Your Honor.

12 THE COURT: Thank you. Give that to the bailiff -- or
13 the clerk to take back there.

14 The record should reflect the jury began its
15 deliberations at 12:59 and the alternate was excused at 12:57.

16 All right.

17 (WHEREUPON, recess awaiting verdict, 11/21/19, 12:59 p.m.)

18 (WHEREUPON, resume 11/21/19, 2:16 p.m., following jury note.)

19 (WHEREUPON, Court's Exhibit Number 7, jury note, was marked
20 for identification.)

21 THE COURT: The jury has a question as follows: Can we
22 see the Sexual Violent Predator statute?

23 My response is as follows: Mr. Foreman, ladies and
24 gentlemen of the jury, the Court has instructed you on the law
25 applicable to this case which includes the Sexually Violent

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1 Predator statute.

2 You must accept the law as the Court has instructed it.
3 If you desire to rehear any portion of the Court's
4 instructions please advise the bailiffs and the Court will
5 accommodate your request.

6 You are not to speculate or draw any conclusions based on
7 this response to your question.

8 Is there any exception to this response from the State?

9 MR. BOGLE: No, Your Honor.

10 THE COURT: From the defense?

11 MR. FALK: No, Your Honor.

12 THE COURT: Okay. I will attach it to the note which has
13 been marked as Court's Number 7.

14 MR. BOGLE: Number who?

15 THE COURT: Seven.

16 MR. BOGLE: Seven. Thank you.

17 THE COURT: And we will see if they want to be
18 reinstructed. We will be at ease.

19 (WHEREUPON, recess 11/21/19, 2:17 p.m.)

20 (WHEREUPON, resume 11/21/19, 2:39 p.m.)

21 THE COURT: Is the State ready to proceed?

22 MR. BOGLE: Yes, Your Honor.

23 THE COURT: Is the defense ready to proceed?

24 MR. FALK: We are, Your Honor.

25 THE COURT: They should be right outside that doorway.

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1 (WHEREUPON, jury enters 11/21/19, 2:40 p.m.)

2 VERDICT

3 THE BAILIFF: The jury is all present, Your Honor.

4 THE COURT: You may be seated.

5 Mr. Foreman, is it correct that the jury has reached a
6 verdict?

7 THE JURY FOREMAN: Yes, we have, Your Honor.

8 THE COURT: If you could give the verdict form to the
9 bailiff for me, please.

10 (WHEREUPON, jury foreman complied)

11 THE COURT: Thank you.

12 Madam Clerk, if you would publish the verdict.

13 He doesn't need to stand. It is a civil case.

14 THE DEPUTY CLERK: As to Case Number 2018-CP-10-03472,
15 the State of South Carolina in the matter of the Care and
16 Treatment of Ronald MJ Gregg, has the petitioner, the State of
17 South Carolina, proved beyond a reasonable doubt that Ronald
18 MJ Gregg is a sexually violent predator under the South
19 Carolina Sexually Violent Predator Act?

20 We the jury unanimously answer the questions as follows:
21 Yes, Ronald MJ Gregg is a sexually violent predator.

22 Signed by the foreperson. Dated November 21st, 2019.

23 THE COURT: Ladies and gentlemen, if this is your verdict
24 please raise your right hand.

25 (WHEREUPON, all jury members complied.)

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1 THE COURT: Let the record reflect that all 12 raised
2 their right hand. You may put your hand down. Does the State
3 wish to poll the jury?

4 MR. BOGLE: No, Your Honor. Thank you.

5 THE COURT: Does the respondent wish to poll the jury?

6 MR. FALK: No, Your Honor.

7 THE COURT: Mr. Foreman, ladies and gentlemen, we thank
8 you for your time and your attention to this case. I know
9 that jury service may seem thankless, but it is such a vital
10 service to us.

11 Charleston County is one of the busiest counties in the
12 state. We have jury trials every week with the exception of
13 holidays, and generally we have two to three civil courts
14 operating and two to three criminal courts operating every
15 week. So as you can well imagine, that is a great volume of
16 work. So you do provide an incredibly valuable service to us.

17 I hope that it has been educational for you. I hope that
18 you have learned that it is nothing like what you see on
19 television and how integral you are to the system.

20 You are excused for the remainder of the week. This is
21 the last case that we will be trying. You are welcome to
22 discuss this case if you would like. Sometimes the lawyers
23 will contact you to get your common sense feedback on how they
24 can do things a little bit better. That is why we call it the
25 practice of law because it is never quite perfected.

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1 If you need a work excuse we can provide those for you on
2 your way out. Your checks will be mailed to you. I hope that
3 y'all have a great holiday season, and you are excused with
4 the court's profound thanks.

5 I will hear post-trial motions in a moment.

6 (WHEREUPON, jury exits 11/21/19, 2:41 p.m.)

7 THE COURT: Are there any post-trial motions from the
8 State?

9 MR. BOGLE: I'm sorry, no, Your Honor. Thank you.

10 THE COURT: Any post-trial motions from the defense?

11 MR. FALK: No, Your Honor.

12 MR. BOGLE: May I approach?

13 THE COURT: Yes, sir.

14 (WHEREUPON, document provided to the Court)

15 THE COURT: Okay.

16 Have you reviewed the order of commitment, Mr. Falk; do
17 you need time to review it?

18 And I will take it downstairs for filing. Do you need
19 copies?

20 MR. BOGLE: Well, wat I would was going to do is -- it is
21 up to you, Judge, but I was ---

22 THE COURT: Once I sign it -- huh-uh ---

23 MR. BOGLE: Okay.

24 THE COURT: Once it goes downstairs you will need to go
25 down there and make arrangements for copies.

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1 MR. BOGLE: I have got to get a filed copy along with
2 instructions who to call at the Department of Mental Health
3 to ---

4 THE COURT: Take care of it? If you follow my clerk
5 downstairs you will be able to make arrangements to do that.

6 MR. BOGLE: Thank you.

7 THE COURT: You are welcome.

8 MR. FALK: Thank you.

9 THE COURT: All right. Is there anything else,
10 gentlemen? Are we good?

11 MR. BOGLE: Not from me. We are good.

12 THE COURT: Thank you so very much. I hope y'all have a
13 great week. It was a pleasure. Try to enjoy your holidays.

14 And please accommodate Mr. Gregg if he needs to. His
15 prayers are at today 2:56, so I think he will probably have
16 time to do it downstairs before y'all transport him.

17 (Whereupon, trial concludes 11/21/19, 2:43 p.m.)

STATE OF SOUTH CAROLINA)	IN THE COMMON PLEAS COURT
)	
COUNTY OF CHARLESTON)	FOR THE 9th JUDICIAL CIRCUIT
)	
In Re Care and Treatment of)	CASE NO.: 2018-CP-10-3472
)	
Ronald MJ Gregg)	
Respondent,)	
_____)	

2019 NOV 13 PM 3:10
 JULIE S. HIGHT
 CLERK OF COURT

RESPONDENT'S MOTION IN LIMINE FOR COUNCIL HEARING TO ESTABLISH THE ADMISSIBILITY OF OPINION TESTIMONY FROM DR. EMILY GOTTFRIED REGARDING PPG TESTING.

Respondent by and through undersigned counsel moves the court *in limine* to conduct a hearing pursuant Rule 702 SCRE; State v Council, 515 S.E.2d 508 (S.C. 1999); and Watson v Ford Motor Company, 699 S.E.2d 169, SC regarding the admissibility of certain testimony expected to be offered from Petitioner's expert witness, Dr. Emily Gottfried, regarding a penile plethysmograph test ("PPG") Respondent underwent on or about March 16, 2016. Contemporaneous with the motion, Respondent's Counsel also files a motion *in limine* to exclude this same PPG testimony on separate grounds.

FACTUAL BACKGROUND

On February 6, 2018 the State of South Carolina retained the Sexual Behaviors Clinic (SBCL) Community & Public Safety Psychiatry Division of the Medical University of South Carolina (MUSC) to provide a second opinion of whether Respondent met the statutory criteria for classification as a Sexually Violent Predator. In a report dated May 6, 2018 Dr. Emily Gottfried of MUSC's SBCL opined that Respondent met the criteria for classification as a Sexually Violent Predator as defined by South Carolina's Sexually Violent Predator Act, S.C. Code Ann. §§ 44-48-10 et seq. In reaching her conclusions Dr. Gottfried relied in part upon the results from March 21, 2019 and April 15, 2019 PPG examinations that MUSC performed on Respondent.

ARGUMENT

A PPG test is similar to a polygraph examination in that it measures a subject's non-verbal physiological responses to external stimuli as a means of assessing the veracity of a subject's verbal response to the external stimuli. Evidence regarding results from polygraph examinations is routinely excluded. State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986). "Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible." Id. at 252, 349 S.E.2d at 404. In re Robert R., 340 S.C. 242, 531 S.E.2d 301 (Ct. App. 2000). See also Rule 702, SCRE; State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). A PPG test is no more reliable than a polygraph examination and the results from PPG testing should be given no more credence in Court than that given to a polygraph examination.

Before an expert's testimony can be published to the jury, the Court, if asked, must carry out its gatekeeping role to determine the admissibility of the evidence. In exercising its gatekeeping duties, the Court must make three preliminary findings. First, the Court must find that the subject matter is beyond the ordinary knowledge of the jury. Second, that the proffered expert has acquired the necessary knowledge and skill to qualify as an expert on the subject matter. Third, the Court must evaluate the substance of the testimony and determine whether it is reliable. Id., Watson 699 S.E.2d at 175. Respondent's challenge to Dr. Gottfried's testimony regarding the PPG centers upon the lack of any proof that PPG testing conducted with both the Marshall and the Real Child Voices (RCV) audio and visual scenarios. Absent peer-reviewed studies attesting to the reliability and standardization of both these stimulus scenarios the Court is left with no assurance that the results of Respondent's PPG test are reliable.

Under Rule 702, Council, and Jones, the trial court must determine whether the "underlying science is reliable." Council at 20, 515 S.E.2d at 518. In making this determination, the court should

examine “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” Id.

“Courts generally have held [the PPG] inadmissible to show the presence or absence of pedophilia.” David H. Kaye, David E. Bernstein, and Jennifer L. Mnookin, The New Wigmore: Expert Evidence, § 8.8.2 at n.21. The Fourth Circuit held the PPG did not meet the scientific standards for admissibility in United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995). The court noted the “extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test.” Id. at 1471.

The Virginia Supreme Court held that an expert’s report that relied on PPG testing was inadmissible, even at a sentencing hearing. Billips v. Commonwealth, 652 S.E.2d 99, 101-02 (2007). The Billips court approached PPG testing with a critical eye:

Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers not schooled in the particular field under consideration. Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be “scientific,” **and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism.** That tendency has given rise to frequent complaints of “junk science” in the courts. To guard against that risk, we continue to require a “threshold finding of fact with respect to reliability of the scientific method offered. . . .”

Id. at 101-02 (emphasis added). It is hard to imagine any field more “esoteric” than PPG testing. The court concluded that the PPG “evidence, lacking foundation, was inadmissible in the sentencing proceeding.” Id. at 102. See also United States v. Medina, 779 F.3d 55, 65 (1st Cir. 2015) (discussing the problems with the reliability of PPG testing where such testing was imposed as a condition of supervised release); Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000) (“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.”); United States v. White Horse, 177 F.Supp.2d 973, 975-76 (D.S.D. 2001) (citing the DSM-IV for the proposition that the PPG “is not accepted as a reliable or valid diagnostic tool”); State v. Spencer, 459 S.E.2d 812, 815 (N.C. Ct. App. 1995) (“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.”); Gentry v. State, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) (“Given the rejection of penile plethysmograph evidence by other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia.”).

As set forth in Dr Gottfried’s report, MUSC used both the Marshall and Real Child Voice (RCV) stimulus sets for Respondent’s PPG test. Counsel is informed and believes that there are no peer reviewed studies that validate these specific stimulus sets that MUSC deployed. Moreover there are no studies that compare PPG test results obtained with the RCV stimulus sets and the Limestone equipment with those obtained with other stimulus sets on other PPG machines. Moreover there are no peer reviewed studies showing the effectiveness of these stimulus sets in discriminating sexual responses by men charged with pedophilic sex crimes with those from men with no known sex offense histories or paraphilic interests.

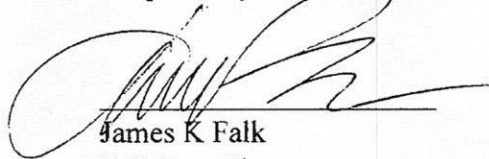
This court should note that in a 2015 article co-authored by William Burke, PhD, R. Gregg Dwyer, MD, EdD and others, the authors stated:

Wide variation exists concerning stimuli types, assessment protocols and means of analyzing and interpreting phallometric results in forensic laboratories in North America. Concerns regarding the lack of standardization in phallometry across sites have been discussed since its creation, however, little improvement has been made. There are challenges in the implementation of standardization within jurisdictions and between countries.

Standardization of Penile Plethysmograph Testing in Assessment of Problematic Sexual Interests, Journal of Sexual Medicine 2015; 12:1853-1854. (Internal citations omitted). This Court should note that R. Gregg Dwyer was formerly associated with MUSC's SBCL and Dr William Burke played a substantial role in the development of the RCV stimulus sets.

Respondent therefore asks that this Court conduct a hearing to establish the reliability of the anticipated PPG testimony from Dr Emily Gottfried regarding Respondent's March 21, 2019 and April 15, 2019 PPG tests.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'James K. Falk', written over a horizontal line.

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 IN THE MATTER OF THE CARE)
 AND TREATMENT OF)
RONALD MJ GREGG,)
 RESPONDENT.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

CASE NO. 2018-CP-10-03472

**STATE'S RETURN TO MOTION TO
 EXCLUDE THE PENILE
 PLETHYSMOGRAPH (PPG) TEST**

2019 NOV 18 AM 9:10
 JULIE M. ANSTROM
 CLERK OF COURT

FILED

To: James K. Falk, Esquire:

The State would make the following Return to the Motion to Exclude the results of the penile plethysmograph test.

Dr. Emily Gottfried will testify regarding the penile plethysmograph test (hereafter, PPG) administered to Respondent. She is a Forensic Psychologist, and was retained by the State for independent evaluation of the Respondent, as allowed under S. C. Code Ann. Section 44-48-90(C). Dr. Gottfried ordered the PPG for Respondent.

The Supreme Court and the Court of Appeals have referenced testimony regarding PPG results in analyzing the sufficiency of evidence to support the verdicts in several SVP cases. *See In re Care & Treatment of Tucker*, 353 S.C. 466, 578 S.E.2d 719, 721 (2003) (“Appellant was administered a Penile Plethysmograph (PPG), which is designed to measure sexual responsiveness to a variety of stimuli across gender, age, and sexual activity. The PPG suggested female and male preschoolers (ages two to four years) aroused appellant.”); *In re the Care and Treatment of Kennedy*, 353 S.C. 394, 578 S.E.2d 27, 38 (Ct. App. 2003) (In support of his argument, Kennedy asserts that because he passed the Penile Plethysmography (PPG) test, which is used to test sexual arousal to

children, this was the best evidence that he would not re-offend.”).¹ In addition, recent case law, reference books and treatises, indicate the PPG now has significant support in the mental health field.²

There are no South Carolina appellate court cases directly addressing the admissibility of testimony regarding the PPG.

Of particular note, the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Ed. (DSM-V) provides:

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

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

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

¹In four SVP cases, the circuit courts found the PPG is recognized in the relevant field, and evidence regarding it is admissible as evidence at trial under *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979), and *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), which established a test for admissibility less stringent than the federal *Frye* test. In two others, it was found inadmissible, but at least one is not on appeal because the Respondent was committed.

²Like virtually all areas of expertise, mental health experts' disagreement regarding the validity of particular tests/tools used by a significant number of practitioners to diagnose and/or treat mental health issues goes to the evidence's weight rather than its admissibility.

DSM-V 699 (emphasis added). Thus, the most widely recognized reference book in the mental health field acknowledges the PPG as a valid tool to be used by the mental health community to provide data particularly relevant to determining a person's risk to reoffend.

The references to the PPG in the DSM-V were not contained in its predecessor, the DSM-IV-TR. This would suggest a greater acceptance of the PPG in the mental health community.

The PPG's history goes back to 1908, when a type of plethysmograph was used to check the effect of certain drugs on the vasomotor reflexes in dogs. Barker, James, and Howell, Robert, *The Plethysmograph: A Review of Recent Literature*, Bull Am. Acad. Psychiatry Law, 20(1): 13-25 (1992). In the 1930s, the medical community began using plethysmograph to assess erectile difficulties. *Id.*

Beginning in 1957, the PPG was used in Czechoslovakia as a method to determine the validity of homosexuality claims by soldiers attempting to avoid military service, and now, it "is a widely recognized means of measuring male sexual arousal to given stimuli." Murphy, L., et. al., *Standardization of Penile Plethysmography in Assessment of Problematic Sexual Interests*, J. Sex. Med. 12(9): 1853-1861 (2015). It "has become a standard objective measure of arousal and is considered by some researchers and clinicians to be essential in the assessment and treatment of male sex offenders and men with paraphilic interests." *Id.*; see also Murphy, L., et. al., *Assessment of Problematic Sexual Interests with the Penile Plethysmograph: an Overview of Assessment Laboratories*, Current Psychiatry Reports 17(5):567 (2015) (PPG "is an objective assessment of sexual arousal based on the change in penis circumference and

volume due to increased vasocongestion in the penis”); Howes R. J. & Howes, S. E., *Sexual Arousal as a Function of Stimulus Mode: Implications for Phallometric Assessment*, J. Forensic Res. 8(6):398 (2017) (PPG is “[p]erhaps the best means of objectively measuring deviant sexual interest”).

The PPG’s general purpose is to measure male sexual arousal, regardless of how the result is used, including assessing erectile dysfunction, checking function after a prostatectomy, or to determine the efficacy of a sexual behavior treatment. The PPG has undergone Federal Drug Administration review, and the FDA has approved the PPG systems (https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf).

In addition, the Medicaid/Medicare regulations provide coverage for PPG tests. *See* Federal Register Volume 72, Number 61, Addendum III and Addendum V (Friday, March 30, 2007) (<https://www.gpo.gov/fdsys/pkg/FR-2007-03-30/html/07-1414.htm>). Major insurance companies, such as Blue Cross Blue Shield, also recognize the PPG as a medical procedure, and either provide limited coverage, or exclude it from coverage. *See* Blue Cross Blue Shield of Texas, Treatment of Male Sexual Dysfunction, Special Comment on Contract Exclusions (January 7, 2003) (<https://www.bcbstx.com/provider/pdf/medicalpolicies/surgery/717-010.pdf>). The Federal Government’s and insurance companies’ recognition of the PPG as a valid medical device and procedure amply demonstrates its general acceptance.

The PPG’s principal purpose in sexual offending behavior evaluations is determining an individual’s level of risk to commit acts of sexual aggression by measuring the extent to which the individual is dominated by sexual arousal to deviant stimuli, and predictions of risk to re-offend “are rendered much more accurate by the

inclusion of data from this technique.” Howes, R. J., *Measurement of Risk of Sexual Violence Through Phallometric Testing*, *Legal Medicine* 11:368-369 (2009). “Although not universally embraced, there nonetheless remains widespread acceptance and recognition of the value of phallometric assessment,” and it “is certainly an assessment procedure which has come a long way since it was first devised.” Howes & Howes, *supra*.³ See also Dean Tong, *The Penile Plethysmograph, Abel Assessment for Sexual Interest, and MSI-II: Are They Speaking the Same Language?*, 35 *Am. J. of Fam. Therapy*, 187, 190 (2007) (“The PPG, when administered properly, represents a direct and objective measurement of a man's level of sexual arousal to normal versus sexualized stimuli. Since there is a strong relationship between an individual's pattern of sexual arousal and the probability that he may or will act upon that arousal, an important first step in gauging one's propensity to sexual deviancy is to obtain an accurate assessment of that person's sexual arousal patterns, which is precisely what the PPG does.”); James M. Peters, *Assessment and Treatment of Sex Offenders: What Attorneys Need to Know*, *Advocate*, 23 (Dec. 1999) (PPG “is invaluable in the evaluation, treatment and management of known sexual offenders.”).

The Second District Appellate Court of Illinois addressed the admissibility of PPG evidence in Illinois sexual predator cases, finding “a significant subset of experts

³Both the polygraph and the PPG measure physical changes, but the PPG differs significantly in that it measures the size of an erection, which is simply either there or not. Unlike the polygraph, during which the examiner makes subjective interpretations of responses as they occur, the PPG technician makes no such interpretation. The PPG results, i.e., the size of the penis erection during certain stimuli, are recorded by the machine with the technician in a separate room. The evaluator then reviews the results and compares the level of arousal to one stimuli set versus another set, which is done by mathematical formula. Experts can disagree about the significance of one arousal over another, but that is no different than any other issue subject to expert opinion.

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

There have been peer-reviewed publications about the applicability of the PPG in SVP cases. In Plaud, *The Use of Penile Plethysmography in SVP Assessment and Treatment Decision-Making* (Forensic Behavior.Com, 2019), the use of the PPG in increasing numbers of SVP cases is noted. Dr. Plaud observed the three implications to SVP evaluation that follow from the development and use of PPG: “(1) patterns of male sexual arousal can be objectively measured; (2) deviant sexual arousal can therefore also be identified on an individual level; and (3) measured changes in patterns of deviant sexual arousal can also be demonstrated as a function of cognitive-behavioral sexual offender treatment strategies developed to modify deviant patterns of sexual arousal.” Plaud at 245 (attached as Exhibit A).

Also available for the Court, if necessary, is McPhail, *Validity in Phallometric Testing for Sexual Interests in Children: A Meta-Analytic Review* (University of Saskatchewan), Assessment, March 2017) (Phallometric Testing – which measures changes in penile circumference or volume which stimuli depicting different ages and

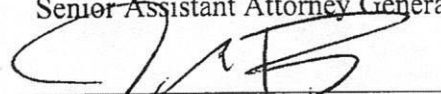
sexual activities are presented – is widely used in clinical and research settings to detect [sexual interest in children].

Dr. Gottfried has extensive experience with the PPG; she is a Limestone Certified Clinical Analyst for PPG interpretation, and while she would readily acknowledge prior problems with the test, she would testify about changes to the test that have significantly reduced false positives or negatives, as well as increased identification of various factors that may invalidate the results, like the person moving around in the chair, holding his breath, and closing his eyes -- all attempts to manipulate the results.

Finally, the result of the PPG would be only one part of an extensive evaluation. It would be correct to receive the PPG results into evidence.

Respectfully submitted,

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November 18, 2019
Charleston, South Carolina

EXHIBIT A



15

The Use of Penile Plethysmography in SVP Assessment and Treatment Decision-Making

Joseph J. Plaud

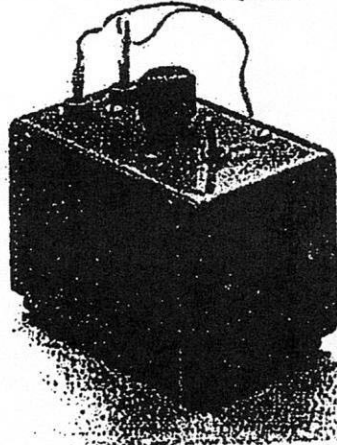
The use of clinical tools in the evaluation and treatment of sexual offenders take on special analytical and ethical scrutiny when the target population concerns those who are involved in sexually violent predator (SVP) legal proceedings. Put bluntly, each and every clinical decision in an SVP case ultimately entails the liberty interests of the sexual offender being evaluated or treated, as day-to-life civil commitment decisions involve the ongoing secure custody of that person after the expiration of the sexual offender's criminal sentence. Even before the advent of SVP laws in 20 American states, the District of Columbia, and within the federal judicial system, penile plethysmography (PPG) was no stranger to controversy as a research instrument, as an evaluation tool, and as an adjunct to cognitive-behavioral sexual offender treatment (Gaither, Rosenkranz, & Plaud, 1998; Plaud & Blackstone, 2014). SVP laws have only broadened the questions and concerns about the ethical, reliable, and valid use of PPG in assessment and treatment decision-making, as well as the manners in which PPG data influences decision-makers in this process. It is to this peculiar area concerning the use of PPG in SVP cases that we now turn our attention.

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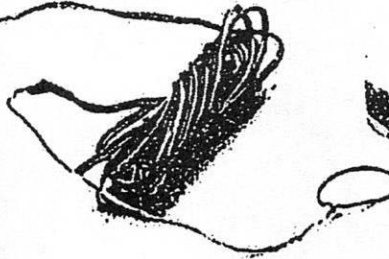
Before analyzing the use of PPG in SVP cases, a short introduction to the instrument itself is in order. As detailed by Plaud and Blackstone (2014), the PPG was developed as a tool to measure physiological patterns of male sexual arousal and by implication sexual deviance. The PPG was introduced by Freund (1963), who described an instrument which recorded changes in penile volume as a function of being exposed to varied sexual stimuli. These changes in volumetric pressure or penile volume were termed phallometry. In an early study, Freund demonstrated that he could correctly classify his subjects according to their stated sexual preferences by the use of phallometry. Freund's research was followed up by numerous other empirical studies over the ensuing decades demonstrating that the PPG could be used to identify both normative and deviant patterns of sexual arousal using volumetric measures as well as othertypes of penile circumference measurement gauges (Plaud & Blackstone, 2014). As noted by Plaud and Blackstone (2014), generally speaking circumferential measures are the most commonly used devices in PPG evaluations. The basic PPG apparatus is visually depicted in Fig. 15.1.

The PPG device itself, which is called in circumferential measures a penile strain gauge, looks like a rubber band, more appropriately described as a small rubber-like ring, generally made of silicone, which contains a column of mercury within. The person being

Analog-to-digital converter (also known as A/D or A to D) which converts voltage changes as a function of changes in penile tumescence to millimeters or centimeters of circumference around the penis



Penile Strain Gauge (also known as a mercury-in-rubber gauge) which is most frequently utilized in PPG evaluations



Cone used to calibrate the specific strain gauge used in the procedure

Fig. 15.1 A visual depiction of the basic PPG apparatus

evaluated via PPG places this rubber-like ring on his penis in privacy. The strain gauge is first calibrated according to standardized protocols, and the essential measurement being recorded during the procedure involves changes in voltage which are then converted to changes in millimeter or centimeter of penile circumference. As noted by Plaud and Blackstone (2014), the PPG procedure is specifically designed to be private and as non-intrusive as possible.

There have been multiple attempts to measure human sexual arousal via physiological assessment techniques. Such approaches have included skin conductance, heart rate, blood pressure, pupillary responses, and temperature measurements. Almost half a century ago, Zuckerman (1971) argued that measure of penile tumescence was the most sensitive and valid measures of sexual arousal developed. This is not to say that the legitimacy of PPG has not been questioned since its inception. It has been both debated and its legitimacy challenged, sometimes vociferously. As detailed by Plaud and Blackstone (2014):

PPG was developed to measure sexual arousal in the most direct manner: by recording changes in the erectile tissue surrounding the penis as it becomes filled with blood. This is the most basic overt physiological manifestation of sexual arousal in the human male. Despite this basic physiology, it remains the case that controversy surrounds the use of PPG as a tool of basic sexual research as well as clinical applications with sexual offenders (O'Donohue & Plaud, 1994; Gaither & Plaud, 1998). This is not to say that basic behavioral research on patterns of sexual arousal has not been conducted; it has, especially in the principles of basic conditioning and habituation of sexual arousal in respondent or classical conditioning (Plaud & Martini, 1999; Rachman, 1966; Rachman & Hodgson, 1968), operant conditioning (Cliffe & Parry, 1980; Rosen, Shapiro, & Schwartz, 1975), and habituation and spontaneous recovery (Koukounas & Over, 1993; Meuwissen & Over, 1990; O'Donohue & Plaud, 1991; Plaud, Gaither, Amato-Henderson, & Devitt, 1997). In most of the scientific studies of the conditioning, habituation and predictive utility of sexual arousal research, the penile plethysmograph (PPG), has been the essential tool of measurement. And yet the apparatus and the procedure are seemingly plagued by controversy (pp. 73-74).

It is also important in PPG evaluations to differentiate between primary and secondary

sexual stimulus characteristics (Gaither & Plaud, 1998). Primary stimulus characteristics refer to the categorical nature of the stimuli themselves; for example, whether or not the stimuli depict normative versus deviant sexual activities. Penile responding to primary stimulus characteristics most clearly correspond with an individual's stated sexual preferences. Secondary stimulus characteristics are those which may vary both within and between categories but lack the salience of primary stimulus characteristics. The results of PPG assessments are normally considered to be due to the manipulation of primary characteristics; yet, if they are not controlled, some secondary stimulus characteristics may confound those results. Mode of sexual stimulus presentation is an example of a secondary stimulus characteristic.

Indeed, an oftentimes overlooked element of conducting PPG evaluations concerns the mode or modes in which the sexual stimuli are presented during the assessment. Modes of PPG stimulus delivery include visual depictions, via slide or video presentation, audio descriptions (spoken text in the first or third person), written text, and fantasy inducement (Julien & Over, 1988). Stimulus combinations can also be conducted. Research has demonstrated that video elicited greater levels of sexual arousal than slides, spoken text, and written text, and fantasy elicited significantly less arousal than the other four modes (Julien & Over, 1988).

The purpose of this chapter is not to provide for a detailed analysis of the reliability and validity of the PPG as an assessment instrument *per se*. The reader should refer to Plaud and Blackstone (2014) for a more detailed analysis and exposition of these issues concerning both adolescent and adult sexual offenders. As pointed out by these authors, the following potential sources of variability should always be considered when employing or inspecting the results of PPG evaluations:

1. The type of strain gauge used and the proper placement of the strain gauge
2. The type of sexual stimuli used (audio, video, both)

3. Specific sexual scenes depicted by the sexual stimuli used
4. Duration of both stimulus and detumescence (quiet) periods
5. The instructions given to the client
6. The type of specific PPG technology employed, including type of recording instrumentation
7. The data sampling rate and type of data interpretation used of PPG results
8. Whether or not probes for dissimulation (faking) were employed during the procedure
9. The setting of the assessment facility (e.g., prison vs. outpatient setting)

Penile Plethysmography in SVP Decision-Making

Beyond the ongoing debate over the psychometric properties of the PPG itself, there are three immediate implications to SVP evaluations that follow from the development and use of PPG: (1) patterns of male sexual arousal can be objectively measured; (2) deviant sexual arousal can therefore also be identified on an individual level; and (3) measured changes in patterns of deviant sexual arousal can also be demonstrated as a function of cognitive-behavioral sexual offender treatment strategies developed to modify deviant patterns of sexual arousal. Why do any of these potential uses of PPG matter in SVP civil commitment cases? Before answering this question, we first need to explore the role of sexual arousal itself in the prediction of future sexual recidivism, a significant issue that SVP statutes are designed to address, namely, reducing sexual offense recidivism by civilly detaining, from a day-to-life, those sexual offenders identified as being the most risky to reoffend.

Since SVP laws were first enacted, professionals involved in the decision-making processes have advanced any number of methodologies designed to weigh and combine sexual offense risk factors in order to predict the likelihood of future sexual offenses. It has been demonstrated many times in the past two decades that mental health professionals employ a clinical

decision methodology, that is, making risk predictions based on idiosyncratic weighing of risk factors, that in fact *decreases* the accuracy of prediction by causing clinicians to overpredict risk. Because the use of clinical judgment most probably produces misleading results that would not accurately identify those offenders who are most likely to reoffend, such analyses generally do not meet the test for scientific acceptance. Despite many efforts to predict sexual recidivism using such clinical judgment, there has been no evidence showing any valid link between such clinical judgments and actual future offenses. And there has been abundant evidence that shows that such predictions are generally no more valid than tossing a coin. The reality is that clinicians' evaluations based on a clinical, or even structured clinical, approach have virtually no predictive utility whatsoever despite their clear beliefs to the contrary (Hanson, 1998):

[M]any of the frequently used risk assessment procedures have questionable validity ... [T]he accuracy of [clinical] risk assessments has been unimpressive ... The clinical prediction of sexual offender recidivism is no exception. Across 10 studies (N = 1453) that examined the predictive accuracy of clinical judgments concerning sexual offender recidivism risk, the average correlation was only 0.10 ... Evaluators assessing the long-term risk for recidivism can be reasonably sure that a factor should not be considered when the average correlation is near 0 ... Included among the unrelated factors are measures of general psychological adjustment ... (average $r = -0.01$). (pp. 52-57)

Even though the validity of making future sexual recidivism risk predictions via any methodology or combination of methodologies has been debated since the first such laws were enacted (cf., Harcourt, 2005), PPG may have an objective, scientifically based role to play in that psycho-legal process.

Penile Plethysmography and SVP Sexual Offense Risk Assessment

Why is PPG important in both the evaluation and treatment of sexual offenders who are being considered for SVP status? The most straightforward

answer to this question is because the identification of deviant sexual arousal has been found by several researchers to be a significant predictor of sexual offense recidivism. Further, publication of these research findings occurred at the very moment in time when many jurisdictions had recently adopted, or were considering adopting, SVP statutes. The most notable example of this type of publication was the oft-relied-upon meta-analysis conducted by Hanson and Bussière (1998). These researchers found that deviant sexual arousal to prepubescent children, measured specifically by the PPG, was the single greatest predictor of sexual offense recidivism, individually accounting for approximately 10% of the experimental variance.

This empirical finding has held up in subsequent studies as well, although the strength of the statistical association between sexual offense recidivism and deviant sexual preferences measured via PPG has not been as strong as in the original Hanson and Bussière meta-analysis (e.g., Hanson & Morton-Bourgon, 2005; Mann, Hanson, & Thornton, 2010). Taken as a whole, and this is important, a survey of the research indicates that there is in fact empirical support for the finding that deviant sexual arousal is a dynamic risk factor for predicting sexual offense recidivism. From a more theoretical perspective, this research finds support in positing that there is a relationship between being sexually aroused by something and acting behaviorally on that arousal (Plaud and Blackstone, 2014). This finding is generally referred to as the "sexual preference hypothesis."

According to the sexual preference hypothesis, sexual offenders, especially those considered for SVP status, are more physiologically aroused by deviant sexual stimuli depicting illegal, coercive sexual activities than by stimuli depicting consenting, legal sexual activity with adults. The sexual preference hypothesis posits that such individuals are more likely to engage in deviant sexual behavior if they have underlying deviant sexual arousal in that domain. From an empirical perspective, PPG research has provided some support for the legitimacy of the sexual preference hypothesis, mostly with sexual offenders

who have prepubescent victims outside of their families, in contrast to incest offenders and adult rapists (Leitenberg & Henning, 1995).

If the measurement of sexual deviance becomes relevant to SVP proceedings, how can the PPG be utilized to assist evaluators in making professional determinations of risk? There are at least two answers to this question, involving the PPG's potential role in both psychodiagnostic and treatment decisions.

The Relevance of Penile Plethysmography to Psychodiagnosis

Part of the legal criteria utilized to find an adjudicated sexual offender to be SVP involves the use of statutory terms such as "mental abnormality" and "personality disorder" and legal constructs which are defined as congenital or acquired conditions of the person that affect that person's volitional capacity or control over his or her sexual behavior (although it should be noted that those deemed SVP are almost universally male). What follows from this central tenet in current SVP laws is that the person being considered for such legal status has an underlying mental condition which motivates or propels that person to commit further acts of sexual violence if not further confined to a secure facility after the expiration of his or her criminal sentence. In other words, such legal SVP definitions implicitly endorse the conclusion that not only is the sexual preference hypothesis legitimate but also that a subset of the clinical population of sexual offenders has significant or serious difficulty in controlling these underlying deviant sexual interests. Therefore, the prevailing notion goes that societal safety demands that such persons identified as sexually, volitionally compromised should remain institutionalized past the expiration of their criminal sentences. This is an essential element of all modern SVP laws that an underlying condition or conditions make a sexual offender likely or more likely than not to engage in further acts of sexual predation if not further confined to a secure facility as SVP.

Consider the statutory definition of a sexually dangerous person (SDP; a variant of the term sexually violent predator in other jurisdictions) in the Commonwealth of Massachusetts under General Laws (G.L.) Chapter 123A, § 1:

...any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility [emphasis added].

Further, G.L. Chapter 123A, § 1 defines mental abnormality in the Commonwealth of Massachusetts as:

A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

Additionally, the Massachusetts SDP statute defines a personality disorder as:

A congenital or acquired physical or mental condition that results in the general lack of power to control sexual impulses.

The federal government of the United States in 18 United States Code § 4248 uses the following similar legal language in this domain, specifically whether the person suffers "from a serious mental illness, abnormality or disorder." All other SVP/SDP statutes contain variations on this basic requirement for a positive finding of sexual dangerousness.

A further implication of this psycho-legal conceptualization of "mental abnormality" or "mental illness" as a component in SVP statutes is that psychodiagnosis is a central element in the SVP legal process. Enter the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* or *DSM-5* (American Psychiatric Association, 2013). The paraphilias defined in the *DSM-5* include voyeuristic disorder, exhibitionistic disorder, frotteuristic disorder, sexual masochism disorder, sexual sadism disorder, pedophilic disorder, fetishistic disorder, transvestic disorder, and "catch-all" diagnostic categories referred to unspecified and other

specified paraphilic disorders. According to the *DSM-5*, "a paraphilic disorder is a paraphilia that is currently causing distress or impairment to the individual or a paraphilia whose satisfaction has entailed personal harm, or risk of harm, to others. A paraphilia is a necessary but not a sufficient condition for having a paraphilic disorder, and a paraphilia by itself does not necessarily justify or require clinical intervention" (page 686). In the *DSM-5*, "Criterion A specifies the qualitative nature of the paraphilia (e.g., an erotic focus on children or on exposing the genitals to strangers), and Criterion B specifies the negative consequences of the paraphilia (i.e., distress, impairment, or harm to others)" (page 686). As the *DSM-5* specifically notes: "In keeping with the distinction between paraphilias and paraphilic disorders, the term *diagnosis* should be reserved for individuals who meet both Criteria A and B." In other words, it is clinically possible to have a paraphilia, but not a paraphilic disorder using the diagnostic criteria of the *DSM-5*.

Can the PPG aid in psychodiagnosis of paraphilic disorders in SVP evaluations? *DSM-5* is equivocal in addressing this question:

Psychophysiological measures of sexual interest may sometimes be useful when an individual's history suggests the possible presence of pedophilic disorder but the individual denies strong or preferential attraction to children. The most thoroughly researched and longest used of such measures is penile plethysmography, although the sensitivity and specificity of diagnosis may vary from one site to another. (p. 699)

A recent meta-analysis of PPG found that several phallometric testing procedures did provide for valid indicators of what the authors termed "pedohebephilic interest," a term discussed in greater detail below (McPhail et al., in press). At the very least, it is clear that a fair number of clinicians do utilize PPG as at least an adjunct assessment tool in order to make paraphilia diagnoses. McGrath, Cumming, Burchard, Zeoli, and Ellerby (2010) found, for example, that in community samples, 27.9% utilized PPG in their evaluations of adult sexual offenders and in 9.5% of adolescent sexual offenders. With adults, that number climbed to 36.5% in residential programs. So while a clinical diagnosis of say, pedophilic disorder, should not be made solely or even

primarily on a PPG administration, it is the case that PPG data can and oftentimes is used as a part of the diagnostic process concerning diagnosing clinical paraphilias.

While the PPG may assist an SVP evaluator in the clinical diagnosis of one of more paraphilias, there is also room for its misuse, most notably using the PPG in order to assist in the creation of paraphilias not generally accepted in the scientific community. One example of this potential misuse of PPG is attempting to expand what the *DSM* terms "other specified paraphilia," a broad diagnostic area historically reserved for low-frequency examples of sexual deviance that don't have their own specific diagnostic criteria. Perhaps the most frequent attempt to create a new sexually deviant diagnostic category in SVP proceedings is the term "hebephilia," which has been used in civil commitment proceedings to describe sexual offenders who evidence sexual arousal to postpubescent males or females who have not yet attained legal status to consent to sexual activities. However, as Rind and Yuill (2012) concluded: "The broad-based scientific evidence indicates that hebephilia is not a dysfunction, and therefore cannot justifiably be declared a mental disorder in the *DSM*" (p. 823). Despite this finding, it is all too common for some clinicians in SVP cases to label the sexual behavior of those who have engaged in sexual activities with pubescents/postpubescents as being within the realm of paraphilic or deviant sexual behavior. Plaud (2009) criticized the use of PPG by Blanchard et al. (2009) to support their conclusion that hebephilia should be considered a paraphilic mental disorder, focusing on improper PPG analysis:

There does not appear to be any homogeneity of groupings along the axes of sexual interest groups. If there are 'hebephiles' among us, then this sexual interest/arousal pattern appears to be a very heterogeneous one. If it is heterogeneous, how can it have diagnostic specificity as Blanchard et al. state it has in their conclusion? Look at Fig. 3. In the pedophile groups (especially Pedo 2), there was significant overlap between physiological arousal to both pre-pubescent and pubescent girls. As a matter of fact, in their Pedo 2 group, there was more arousal to pubescent girls than to pre-pubescent girls. And this relation does not seem to hold for homosexual males (even though Blanchard et al. state that the hetero/homo groups were remarkably similar). How is that a diagnostic indicator of pedophilia?...

In the final analysis, rather than establish the validity of a bona fide diagnostic category such as hebephilia for inclusion in the *DSM-5*, these data show that Blanchard et al. labeled Hebe groups tend to be more Pedo "light" groups than a separate class of sexual deviates, at least with the heterosexual subjects. (p. 327)

Suffice it to say that the use of professionally dubious paraphilia terms such as "hebephilia" is prevalent in SVP proceedings (Singy, 2015). SVP evaluators should be cautious in the use of pseudo-diagnostic terms when there is no accepted empirical validation utilizing the PPG. Another example of this troubling trend concerns what was advanced by certain clinicians involved in SVP proceedings as "paraphilia NOS – nonconsent," or more recently in *DSM-5*, "other specified paraphilia – nonconsent." As with "hebephilia," these terms do not represent formal, accepted clinical diagnoses, and the "nonconsent" label has not achieved acceptance in the professional community of psychologists and psychiatrists. The *DSM-5* does have a specific category of clinical diagnosis related to rape-related paraphilia; it is entitled sexual sadism, and PPG should be used to present objective data on both normative and deviant patterns of sexual arousal, not to advance agendas to increase the range of paraphilia diagnoses beyond what the *DSM-5* has validated in order to make more diagnoses available to clinicians in context of SVP proceedings. Remember, because all modern SVP laws rely upon the identification of an underlying condition or conditions which affects the emotional, cognitive, or volitional capacity of the sexual offender being considered for civil commitment, there is an ongoing possibility that psychodiagnosis can be misused and misapplied in this psycho-legal context.

The Relevance of Penile Plethysmography to Treatment Decisions

Perhaps the main strength of PPG evaluations in SVP contexts concerns its use as an adjunct to cognitive-behavioral sexual offender treatment. As Gaither et al. (1998) pointed out, many of the most commonly employed techniques are based upon the principles of learning and conditioning. As such, it becomes important to have precise

measurements of sexual arousal for two primary reasons: (1) measuring change in sexual arousal patterns over time as a result of treatment participation and (2) targeting deviant arousal directly in order to administer behaviorally based interventions such as the administration of punishing stimuli (e.g., use of ammonia inhalants) or covert sensitization techniques (Alford, Plaud, & McNair, 1995; O'Donohue & Plaud, 1994).

How can PPG be employed as an adjunct to behavioral treatment of sexual offenders committed under SVP statutes? Although the *DSM-5* specifies a number of topographically divergent paraphilias, ranging from noncontact (e.g., exhibitionistic disorder) to contact (e.g., pedophilic disorder) paraphilias, behavior analytic approaches focus upon stimulus control and conditioning approaches to sexual arousal, as well as the relationship of sexual arousal to sexual behavior (Barbaree & Marshall, 1991; O'Donohue & Plaud, 1994; Gray & Plaud, 2005). Behavior analytic approaches to paraphilias have as their bases the relationships among habituation, respondent (or classical) and operant conditioning, and overt sexual expression (Plaud, 2005). Given the wide applicability of conditioning principles (Plaud & Vogeltanz, 1993), a common theoretical assumption is that sexual responses are learned (O'Donohue & Plaud, 1994). Learning-based accounts of sexual behavior focus on the importance of both conditioning and habituation of sexual arousal; however, there are differences in the extent to which different behavioral theories emphasize the role of conditioning-related factors (O'Donohue & Plaud, 1994).

Further, understanding the etiology of the sexual paraphilias to a large extent rely on the assumption that at least to some extent sexual behavior and arousal are learned. For example, theories derived from anthropology and sociology have also claimed that human beings learn the range of sexual behavior through a variety of societal and cultural mechanisms (Davenport, 1987; DeLamater, 1987). In applied behavioral contexts, the shaping, maintenance, and modification of paraphilias have been explained by theories of learning (Barbaree & Marshall, 1991; Laws & Marshall, 1991; LoPiccolo & Stock, 1986; Masters & Johnson, 1970). For example, paraphilias have been hypothesized to

develop due to early conditioning experiences and to be maintained by their association with orgasm from masturbation to deviant fantasies or through other mechanisms of the principles of reinforcement (Laws, Myer & Holmes, 1978; O'Donohue & Plaud, 1994). Many behavior therapy regimens used to treat sexual disorders also rely on learning principles in the modification of sexually deviant behavior (Kelly, 1982). The PPG is designed to measure potential changes in the patterns of sexual arousal as a function of cognitive and behavioral intervention/treatment strategies designed to target deviant sexual arousal.

The use of PPG in the treatment of an adjudicated sexual offender was described in a case study conducted by Plaud and Gaither (1997) in which a procedure known as assisted covert sensitization was evaluated through PPG monitoring. Covert sensitization as a behavioral intervention involves a combination of respondent and operant conditioning (Plaud, 2002). In the early stages of treatment, the therapist and client come up with an aversive image or verbal script/narrative, later used to pair with situations involving the lead up to deviant sexual responding. The aversive image may be conceptualized as an unconditioned stimulus (US). The images of the events/situations leading to deviant sexual arousal are then paired with the US and according to the principles of respondent conditioning become the conditioned stimulus (CS). The unconditioned response (UR) to the US, and the conditioned response (CR) to the CS consist of negative reactions along both emotional and cognitive/behavioral domains; for example, feeling fearful or anxious and becoming nauseous or physically ill. According to the principles of learning and behavior, the therapeutic technique is for the sexual offender to avoid or escape the situations associated with the deviant sexual behavior due to the aversive consequences of that behavior. As the therapeutic procedure unfolds, sexual arousal is measured via PPG monitoring. Employing this therapeutic methodology, Plaud and Gaither (1997) demonstrated decreased deviant arousal to sexually inappropriate stimuli, coupled with decrement self-report of deviant

sexual arousal as one of the findings in their case study reported in the literature. The PPG was the required measurement tool to demonstrate clinical efficacy in this study.

There are many other behaviorally based sexual offender treatment techniques employed in SVP facilities in which PPG can be used as an adjunct to treatment. Such techniques can include olfactory aversion or olfactory aversive therapy. Similar to covert sensitization as described above, olfactory aversion is based closely on learning principles; however in this case, the punishing stimulus is in the form of a noxious odor. The behavioral theory underlying olfactory aversion also involves principles involving both respondent and operant conditioning (Gaither et al. 1998). In contrast to covert or assisted covert sensitization described above in which an aversive (or punishing) stimulus is based upon the use of imagery and verbal scripts/narratives, the punishing stimulus is the use of ammonia, valeric acid, or other noxious odors which generally are self-administered by the treatment participant himself. Sometimes a small atomizer, which is designed to spray a small amount of a noxious vapor into the treatment participant's nostrils, is also employed. Again, the treatment participant's sexual arousal is being monitored via PPG.

PPG evaluations, conducted periodically while individuals deemed SVP continue to participate in sexual offender treatment, can also be used to assess whether or not the individual is demonstrating changes in deviant sexual arousal as he advances through the treatment program, whether or not he is engaging directly in behavioral treatment as described above. PPGs can also assist in the assessment of behavioral treatment strategies aimed at decreasing deviant sexual arousal, such as masturbatory satiation. In brief, masturbatory satiation involves the treatment participant masturbate while engaging in deviant fantasies for a much longer time than is pleasurable, usually 1–2 hours at a time). In masturbatory extinction, the goal of treatment is to increase sexual arousal to nondeviant fantasies while he masturbates while engaging in nondeviant fantasies until he ejaculates (Alford, Morin, Atkins, & Schoen, 1987).

As a final example of behavioral treatment interventions which can be monitored through PPG assessment, orgasmic reconditioning is a technique in which the therapeutic goal is to increase appropriate sexual responding, while decreasing deviant arousal. Sexual arousal to nondeviant stimuli is increased, while simultaneously sexual responding to deviant stimuli is decreased, as reported by several researchers (Foote & Laws, 1981; Keller & Goldstein, 1978; Kremsdorf, Holmen, & Laws, 1980; Laws, 1985). The basic procedure is to have the client engage in deviant fantasies, but before ejaculation occurs, he is instructed to switch to a nondeviant fantasy, which then becomes paired with the reinforcing orgasm.

Cognitive-behavioral treatment of sexual offenders adjudicated as SVP obviously involve multiple strategies and techniques beyond the application of direct learning principles to sexual responding, monitored via PPG (e.g., social skills training, assertiveness training, other behavioral skills training, relaxation training, and systematic desensitization). However, data gathered over time from PPG evaluations while SVP clients are undergoing treatment participation can help to pinpoint changes in sexual arousal, which can be considered to be a critical index of the success of sexual offender treatment targeted at reductions in deviant arousal and/or increased level of normative sexual responding.

Penile Plethysmography and SVP Decision-Making in the Courtroom

When an individual is being considered for SVP status, how do PPG results enter into the legal process of civil commitment? There are three scenarios in which PPG results can become incorporated into SVP proceedings. The first scenario involves historic PPG evaluations conducted prior to the civil commitment petition. These types of PPG evaluations take place when the sexual offender was still serving a criminal sentence, as part of an earlier evaluation or participation in treatment. The second possibility involves PPG evaluations conducted by one or

more government or defense experts in context of the current SVP petition, incorporated in their clinical findings and psychodiagnoses provided to the court. The third scenario relates to SVP release cases, involving one or more PPG evaluations conducted as part of post-commitment treatment participation.

In many cases admission of PPG results directly in court proceedings has not been allowed, whether under the Frye or Daubert standards, depending upon the jurisdiction in which the SVP petition is filed. The older of the two evidentiary standards in court, Frye, deals with whether the methodology in question is "generally accepted" by relevant experts in the field in which it belongs (*Frye v. United States*, 293 F. 1013 (D.C. Cir.), 1923). Under the Daubert standard, a methodology is evaluated on the following factors, one of which incorporates Frye: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 1993).

A main reason for the exclusion of PPG results in SVP trials is that the procedures did not meet either the Frye or Daubert standard which controls the admitting of evidence in that case. As noted above, it is the fact that there is ongoing debate among professionals concerning the reliability and validity of the PPG, as discussed in greater detail by Plaud and Blackstone (2014). For example, in *United States v. Powers*, 59 F.3d 1460 (4th Circuit, 1995), PPG was excluded because the court found that it did not qualify under the scientific validity prong of Daubert. This is not to say that PPG are automatically discredited or discarded in SVP proceedings. There are cases in which PPG results do enter into the court record; and even if PPG results per se do not make it into the record, PPG data can still enter the civil commitment proceeding in court through testifying expert witnesses. In such cases the expert's psychodiagnostic or risk conclusions in part may be derived from PPG results, even

though the results themselves do not become directly incorporated into the evidentiary record. Therefore, PPG results have the possibility of entering into SVP cases either directly as evidence, or indirectly through its influencing expert opinion, which ultimately translates into court testimony.

It is also true that individual jurisdictions can take specific positions on the use of PPG in SVP proceedings as a matter of statute. The first state to create what can be called the "second wave" of SVP laws is the State of Washington, which enacted its sexual offender civil commitment statute in 1990. A dozen years later, in 2012, the state legislature amended Washington's SVP law and specifically permitted the court to compel PPG evaluations in SVP cases. In the Revised Code of Washington 71.09.050(1), it states that:

Within forty-five days after the completion of any hearing held pursuant to RCW 71.09.040, the court shall conduct a trial to determine whether the person is a sexually violent predator...The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state. The judge may require the person to complete any or all of the following procedures or tests if requested by the evaluator... (c) plethysmograph testing [emphasis added].

The constitutionality of compelling the use of the PPG in Washington SVP proceedings has recently been held up on appeal (*State of Washington v. Donald Herrick*, App. No. 69818-4-1, 2017). In other jurisdictions outside of Washington, sexual offenders facing civil commitment can also be court-mandated to participate in PPG evaluations (Garrison, 2015), although generally speaking PPG results face an uphill battle for admissibility in court, even when such results lead to sexual offender treatment recommendations within an SVP institution.

Conclusion: PPG Evaluations in SVP Proceedings

When SVP proceedings are initiated against adjudicated sexual offenders whose criminal sentences are about to expire, or when those already deemed SVP initiate proceedings to end that legal status, PPG data are not oftentimes consid-

ered central or even relevant in the ultimate decision processes involved in civil commitment. Yet as we have seen, PPG has the potential to have applicability to all elements of the SVP process, from psychodiagnosis to measuring sexual offender treatment progress. Further, the manner in which PPG results influence SVP proceedings can vary significantly, and very often PPG data has a more indirect role to play in the sexual offender civil commitment process.

The PPG was designed over half a century ago in order to measure patterns of male sexual arousal objectively and scientifically. As we have seen, the proper identification of deviant patterns of sexual arousal may have relevance to SVP proceedings given the established empirical relationship between deviant sexual arousal and the prediction of sexual offense recidivism, as analyzed in our exploration of the sexual preference hypothesis. Further, the PPG can and is being utilized in SVP sexual offender treatment programs in order to measure changes in patterns of deviant sexual arousal as a function of treatment participation. It is also true that there is ongoing controversy concerning the psychometric properties of the PPG in the evaluation and treatment of sexual offenders, and even at this time there is no "standardized" assessment protocol when it comes to PPG administrations. However, there is little doubt that when a civil commitment law is based in large part upon statutory definitions that invoke underlying mental conditions as requisite for the finding that an adjudicated sexual offender is SVP, there needs to be a way to measure sexual deviance in an objective manner.

This chapter has been focused on the many ways in which PPG can and does play a role in SVP civil commitment of sexual offenders. It should also be noted that SVP programs should address the potential community reintegration of those adjudicated SVP because lifetime institutional commitment is not the goal of these statutes. Rehabilitation and community reintegration are the ultimate goals of all SVP statutes currently enacted in the United States. Once a sexual offender is no longer considered SVP, whether through demonstration that the person has made satisfactory progress in a sexual offender treat-

ment program or other nontreatment-related reasons, that person should be placed in some type of transition program that will serve as the first step to community reintegration and aftercare of the person. It has been found that for sexual offenders in general, the first 2 years after release from an inpatient treatment program or correctional facility are the most critical in terms of sexual recidivism (Gaither et al. 1998). Oftentimes PPG evaluations conducted institutionally can provide for more specific recommendations for tailoring sexual offender treatment in outpatient settings after an SVP is released back into the community.

In the final analysis, the PPG as both a research and clinical tool is here to stay. Like any tool or assessment procedure, the PPG has its pluses and minuses, its accomplishments and controversies. PPG data should always be used as one piece of information in making clinical (and legal) decisions in SVP proceedings. Civil commitment of sexual offenders should never be based upon PPG findings in any context. The PPG is a useful tool in attempting to understand the specific patterns of sexual arousal for individuals involved in the SVP process; and it can also be useful as an adjunct to cognitive-behavioral treatment programs. When utilized validly and ethically, the PPG can have a significant role to play in the civil commitment of sexual offenders.

References

- Alford, G. S., Morin, C., Atkins, M., & Schoen, L. (1987). Masturbatory extinction of deviant sexual arousal: A case study. *Behavior Therapy, 18*, 265-271.
- Alford, G., Plaud, J. J., & McNair, T. L. (1995). Conditioning perspectives on sexual behavior and orientation. In L. Diamant & R. McAnulty (Eds.), *The psychology of sexual orientation, behavior and identity: A handbook* (pp. 121-135). Westport, CT: Greenwood Publishing.
- American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders* (5th ed.). Washington, D.C.: American Psychiatric Association.
- Barbaree, H. E., & Marshall, W. L. (1991). The role of male sexual arousal in rape: Six models. *Journal of Consulting and Clinical Psychology, 59*, 621-630.
- Blanchard, R., Lykins, A. D., Wherrett, D., Kuban, M. E., Cantor, J. M., Blak, T., et al. (2009). *Archives of Sexual Behavior, 38*, 335-350.
- Cliffe, M. J., & Parry, S. J. (1980). Matching to reinforcer value: Human concurrent variable-interval performance. *Quarterly Journal of Experimental Psychology [A] or [B], 32*, 557-570.
- Davenport, W. H. (1987). An anthropological approach. In J. Geer & W. O'Donohue (Eds.), *Theories of human sexuality* (pp. 197-236). New York: Plenum Press.
- DeLamater, J. (1987). A sociological approach. In J. Geer & W. O'Donohue (Eds.), *Theories of human sexuality* (pp. 237-256). New York: Plenum Press.
- Foote, W. E., & Laws, D. R. (1981). A daily alternation procedure for orgasmic reconditioning with a pedophile. *Journal of Behavior Therapy and Experimental Psychiatry, 12*, 267-273.
- Freund, K. (1963). A laboratory method of diagnosing predominance of homo- or heteroerotic interest in the male. *Behavior Research and Therapy, 12*, 355-359.
- Gaither, G. A., & Plaud, J. J. (1998). The effects of secondary stimulus characteristics on male sexual arousal. *Journal of Sex Research, 34*, 231-236.
- Gaither, G. A., Rosenkranz, R. R., & Plaud, J. J. (1998). Sexual disorders. In J. J. Plaud & G. H. Eifert (Eds.), *From behavior theory to behavior therapy* (pp. 152-171). Boston: Allyn & Bacon.
- Garrison, L. J. (2013). Sexually violent predator law: A defense perspective. In A. Phenix & H. M. Hoberman (Eds.), *Sexual offending* (pp. 835-841). New York: Springer.
- Gray, S. R., & Plaud, J. J. (2005). A comparison of the Abel assessment for sexual interest and penile plethysmography in an outpatient sample of sexual offenders. *Journal of Sexual Offender Civil Commitment: Science and the Law, 1*, 1-10.
- Hanson, R. K. (1998). What do we know about sex offender risk assessment? *Psychology, Public Policy, and Law, 4*, 50-72.
- Hanson, R. K., & Bussière, M. T. (1998). Predicting relapse: A meta-analysis of sexual offender recidivism. *Journal of Consulting and Clinical Psychology, 66*, 348-362.
- Hanson, R. K., & Morton-Bourgon, K. (2005). The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies. *Journal of Consulting and Clinical Psychology, 73*, 1154-1163.
- Harcourt, B. E. (2005). *Against prediction: Sentencing, policing, and punishing in an actuarial age*. University of Chicago Public Law and Legal Theory Working Paper No. 94.
- Julien, E., & Over, R. (1988). Male sexual arousal across five modes of erotic stimulation. *Archives of Sexual Behavior, 17*, 131-143.
- Keller, D. J., & Goldstein, A. (1978). Orgasmic reconditioning reconsidered. *Behavior Research and Therapy, 16*, 299-301.
- Kelly, R. J. (1982). Behavioral reorientation of pedophiles: Can it be done? *Clinical Psychology Review, 2*, 387-408.

- Koukounas, E., & Over, R. (1993). Habituation and dishabituation of male sexual arousal. *Behavior Research and Therapy*, 31, 575-585.
- Kremsdorf, R. B., Holmen, M. L., & Laws, D. R. (1980). Orgasmic reconditioning without deviant imagery: A case report with a pedophile. *Behavior Research and Therapy*, 6, 203-207.
- Laws, D. R. (1985). Sexual fantasy alternation: Procedural considerations. *Journal of Behavior Therapy and Experimental Psychiatry*, 16, 39-44.
- Laws, D. R., & Marshall, W. L. (1991). A conditioning theory of the etiology and maintenance of deviant sexual preference and behavior. In W. L. Marshall, D. R. Laws, & H. E. Barbaree (Eds.), *Handbook of sexual assault*. New York: Plenum.
- Laws, D. R., Meyer, J., & Holmes, M. L. (1978). Reduction of sadistic sexual arousal by olfactory aversion: A case study. *Behavior Research and Therapy*, 16, 281-285.
- Leitenberg, H., & Henning, K. (1995). Sexual fantasy. *Psychological Bulletin*, 117, 469-496.
- LoPiccolo, J., & Stock, W. E. (1986). Treatment of sexual dysfunction. *Journal of Consulting and Clinical Psychology*, 54, 158-167.
- Mann, R. E., Hanson, R. K., & Thornton, D. (2010). Assessing risk for sexual recidivism: Some proposals on the nature of psychologically meaningful risk factors. *Annals of Sex Research*, 22, 191-217.
- Masters, W., & Johnson, V. (1970). *Human sexual inadequacy*. Boston: Little, Brown.
- McGrath, R. J., Cumming, G. F., Burchard, B. L., Zeoli, S., & Ellerby, L. (2010). *Current practices and emerging trends in sexual abuser management*. Brandon, VT: Safer Society Press.
- McPhail, I. V., Hermann, C. A., Fernane, S., Fernandez, Y. M., Nunes, K. L., & Cantor, J. M. (in press). Validity in phallometric testing for sexual interests in children: A meta-analytic review. *Assessment*.
- Meuwissen, I., & Over, R. (1990). Habituation and dishabituation of female sexual arousal. *Behavior Research and Therapy*, 28, 217-226.
- O'Donohue, W., & Plaud, J. J. (1991). The long-term habituation of human sexual arousal. *Journal of Behavior Therapy and Experimental Psychiatry*, 22, 87-96.
- O'Donohue, W., & Plaud, J. J. (1994). The conditioning of human sexual arousal. *Archives of Sexual Behavior*, 23, 321-344.
- Plaud, J. J. (2002). Assisted covert sensitization. In M. Hersen & W. Sledge (Eds.), *Encyclopedia of psychotherapy* (Vol. 1, pp. 125-130). London: Academic.
- Plaud, J. J. (2005). Covert sensitization conditioning. In M. Hersen & J. Rosqvist (Eds.), *Encyclopedia of behavior modification and cognitive behavior therapy, volume 1: Adult clinical applications* (pp. 235-241). London: Sage Publications.
- Plaud, J. J. (2009). Are there hebephiles among us? *Archives of Sexual Behavior*, 38, 326-327.
- Plaud, J. J., & Blackstone, K. E. (2014). Penile plethysmography. In D. S. Bromberg & W. T. O'Donohue (Eds.), *Toolkit for working with juvenile sex offenders* (pp. 69-87). San Diego, CA: Elsevier.
- Plaud, J. J., & Galther, G. A. (1997). A clinical investigation of the possible effects of long-term habituation of sexual arousal in assisted covert sensitization. *Journal of Behavior Therapy and Experimental Psychiatry*, 28, 281-290.
- Plaud, J. J., & Martini, J. R. (1999). The respondent conditioning of male sexual arousal. *Behavior Modification*, 23, 254-268.
- Plaud, J. J., Galther, G. A., Amato-Henderson, S., & Devitt, M. K. (1997). The long-term habituation of sexual arousal in human males: A crossover design. *The Psychological Record*, 47, 385-398.
- Plaud, J. J., & Vogelanz, N. D. (1993). Behavior therapy and the experimental analysis of behavior: Contributions of the science of human behavior and radical behavioral philosophy. *Journal of Behavior Therapy and Experimental Psychiatry*, 24, 119-127.
- Rachman, S. (1966). Sexual fetishism: An experimental analogue. *Psychological Record*, 16, 293-296.
- Rachman, S., & Hodgson, R. J. (1968). Experimentally-induced "sexual fetishism": Replication and development. *Psychological Record*, 18, 25-27.
- Rind, B., & Yuill, R. (2012). Hebephilia as mental disorder: A historical, cross-cultural, sociological, cross-species, non-clinical, empirical, and evolutionary review. *Archives of Sexual Behavior*, 41, 797-829.
- Rosen, R. C., Shapiro, D., & Schwartz, C. (1975). Voluntary control of penile tumescence. *Psychosomatic Medicine*, 37, 479-483.
- Singy, P. (2015). Hebephilia: A postmortem dissection. *Archives of Sexual Behavior*, 44, 1109-1116.
- Zuckerman, M. (1971). Physiological measures of sexual arousal in the human. *Psychological Bulletin*, 75, 297-329.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
IN THE MATTER OF THE)
CARE AND TREATMENT OF)
)
RONALD MJ GREGG,)
)
RESPONDENT.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE #: 2018-CP-10-03472

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SC Court of Appeals

ORDER OF COMMITMENT

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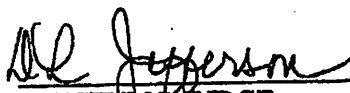
The trial of this case was held in the Charleston County Court of Common Pleas the week of November 18, 2019. A jury of citizens from Charleston County heard this case pursuant to a request for a jury trial filed by the State. Senior Assistant Attorney General James G. Boger Jr. represented the State and James K. Falk., Esquire, represented the Respondent. The jury having heard the presentation of the evidence made the following findings of fact pursuant to S. C. Code Ann. Sections 44-48-90 and 44-48-100:

The State has proven beyond a reasonable doubt that Respondent, Ronald MJ Gregg, is a sexually violent predator as that term is defined in S. C. Code Ann. Section 44-48-30.

NOW, THEREFORE, IT IS ORDERED THAT:

- (a) Respondent Ronald MJ Gregg, is committed to the Department of Mental Health for his long-term control, care and treatment;
- (b) Respondent Ronald MJ Gregg, is to continue to be detained at the Charleston County Detention Center, and then transported to the secure facility of the South Carolina Department of Mental Health. The Detention Center is to transport Respondent on such scheduled date as it coordinates with the Department of Mental Health.

AND IT IS SO ORDERED.



PRESIDING JUDGE
Ninth Judicial Circuit
Court of Common Pleas

November 21, 2019
Charleston, South Carolina

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

Respectfully Submitted,

s/David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

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Apr 19 2021

SC Court of Appeals

This 19th day of April, 2021.