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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Anderson County  
The Honorable R. Scott Sprouse, Circuit Court Judge  
Appellate Case No. 2021-000249

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In the Matter of the Care and Treatment  
of James L. Williford,

Appellant.

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**FINAL BRIEF OF RESPONDENT**

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**STATEMENT OF THE CASE**

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

## STATEMENT OF FACTS

In February 2003, Appellant James L. Williford pled guilty to one count of assault and battery with intent to kill and two counts of criminal sexual conduct, first degree, arising from the sexual assaults of two adult female victims, and sentenced to twenty years incarceration. Prior to Appellant's release from incarceration, Respondent State of South Carolina initiated a civil action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Appellant's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was called for a bench trial on June 14, 2021, before the Honorable R. Scott Sprouse, Circuit Court Judge.

Prior to trial, Appellant moved to exclude all testimony regarding a penile plethysmograph (PPG) administered to him during an evaluation by Emily Gottfried, Psy.D, of the Medical University of South Carolina (MUSC). Appellant argued there was no standardization related to the PPG, there was no adequate publication or peer review, there were no quality controls in place to ensure reliability, and there was no margin of error that could be measured. In response, the State proffered testimony from Dr. Gottfried. (Trial Transcript [TT], pp. 21-30, Motion to Suppress, State's Return to Respondent's Motion to Suppress; Record on Appeal [R.], pp. 21-30; 253-266).

Dr. Gottfried was qualified as an expert in forensic psychology by stipulation. She testified she is an assistant professor of psychiatry and behavioral sciences at the Medical University of South Carolina (MUSC) and serves as the director of MUSC's Sexual Behaviors Clinic and Lab (SBCL). Her duties include conducting forensic evaluations, overseeing treatment, and teaching and supervising medical students, psychiatry residents, forensic fellows and an assortment of students. (TT, p. 33; R., p.33).

Dr. Gottfried is a clinical member of the Association for the Treatment of Sexual Abusers (ATSA), which is a national organization dealing with the type of work performed at the SBCL, and she sits on the executive committee of the South Carolina ATSA Chapter. She also serves on the executive committee of the American Psychological Association (APA) Division 41, which is the American Psychology and Law Society, as well as the executive committee of the APA Division 12, which deals with clinical psychology assessment. She is also a member of the American Academy of Forensic Sciences, and other similar organizations, and is a member of the International Standardization Committee for the PPG. (TT, pp. 31-32; R., pp. 31-32).

Dr. Gottfried testified she had published twenty-six peer reviewed articles, written six book chapters, and given peer reviewed PPG specific presentations and lectures at numerous professional conferences in the United States and Canada. In 2019, she joined with colleagues from the United States, Canada and the United Kingdom to publish a paper in Behavioral Sciences and the Law regarding the used of the PPG in courts across those countries. She stated she has requested approximately forty-two PPGs over the course of her career, with thirty-one specific to sexually violent predator cases. (TT, pp. 32-33; R., pp. 32-33).

Dr. Gottfried became involved in the instant case after the State requested that the SBCL conduct an independent pre-commitment evaluation of Appellant. Consistent with the best practices in the field, the SBCL evaluation includes reviewing data from multiple sources and multiple methods of testing to look for general psychopathologies, symptoms of mental illnesses, personality disorders, and sexual arousal. They then assess the data gathered in multiple ways. The standard protocol used by the SCBL consists of: 1) a thorough review of all available collateral records; 2) an assessment of general psychopathology, personality functions, substance use, sexual functions and sexual history; 3) an assessment of sexual arousal; 4) scoring several risk instruments

that look at risk factors from the scientific literature; and 5) conducting an extensive clinical interview with the person. (TT, p. 34; R., p. 34).

Dr. Gottfried testified she is trained on the PPG and is a licensed and certified clinical analyst. The SCBL has been certified by Limestone Technologies (which manufactures the PPG machine used at the SBCL) as both a clinical and research laboratory. She stated the research certification is the highest level possible. (TT, pp. 43-45; R., pp. 43-45).

The PPG is part of the SBCL's standard protocol because it provides another data point, and sexual arousals due to nonconsensual or abusive stimuli provides a strong predictor of future sexual recidivism. The research also shows the individuals being evaluated pursuant to a sexual predator act have reasonable motivation to not be very forthcoming about their sexual arousals, and the PPG provides a data point regarding sexual arousal patterns, which the SBCL uses in combination with the person's self-report and the results of other tests. (TT, pp. 35-36; R., pp. 35-36).

The PPG has been peer reviewed and approximately 100 publications specific to abusive or illegal sexual behaviors have discussed use of the PPG. The PPG is also discussed in the general sexual behavior literature, looking at things like erectile dysfunction, sexual health and wellness. Dr. Gottfried testified a peer review paper published on June 8, 2021, in the general sexual behavior literature section of Nature, which "is a really, really high impact factor journal," found the PPG "may be useful as a non-invasive potential technique to evaluate penile erection in men's health," and it "can actually be applied to clinical penile hardness and erectile function assessments." (TT, pp. 36-37; R., pp.36-37).

Dr. Gottfried testified the SBCL has multiple quality controls for the PPG testing. Everyone in the SBCL is certified by Limestone to do their parts of the test, including

administration of the test and interpretation of the data. They use a new gauge for each test, and the gauge is calibrated on a five-step program before a test can even begin. They also use countermeasures to make sure the test administration is reliable, and each test is conducted in the same way for every examinee. They do a sound check, and constantly monitor the temperature and humidity in the test room. There are standardized instructions in a ten page document with a numbered checklist that the person administering the test goes over with each examinee. (TT, pp. 39-40; R., pp. 39-40).

The equipment is also set-up to detect when the examinee is trying to manipulate the results of the test. The examinee may move around or squirm in the seat, try to have an erection to something he is not aroused to by flexing, or hold his breath. One countermeasure is the pad the examinee sits on during the test picks up movements, and another is a respiration strap which indicates any irregularities in breathing. There is also a keypad on the examinee's chair, and the examinee is instructed to press it if a scenario becomes either violent or sexual, which demonstrates whether the examinee is actually paying attention during the test. The examinee may be asked to briefly describe a scenario, which is also designed to measure the examinee's attention to the test. (TT, pp. 40-41; R., pp. 40-41).

The SBCL uses a very conservative cut score (change in penile circumference) to determine whether results are significant or not significant. Studies have shown that anything under ten percent of a full erection (2.5 mm) from baseline is not a valid way to score the test, and the SBCL uses a cut score of five, in part to avoid false positive results.<sup>1</sup> Dr. Gottfried testified

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<sup>1</sup>Dr. Gottfried testified the cut scores are an area the Committee on Standardization is considering, and different scores may be used depending on what the PPG is being used for. Another standardization issue is the fact that other countries are allowed to use child pornography in a PPG test, but the United States does not use child pornography. Through the Committee's

using a high cut score may lead to missing some people (false negatives), but in high stakes evaluations such as those pursuant to the SVPA, they do not want to say an examinee is aroused by something when he is not. She also reiterated the PPG is only one data point considered in SBCL evaluations. (TT, pp. 41-42; R., pp. 41-42).

Dr. Gottfried testified the ATSA practice guidelines for assessment, treatment and management of male sex offenders, published in 2014, recognize the PPG as a useful tool in both assessment and treatment of adult men because it provides a means to obtain objective behavioral data that may not be readily established through other assessment means, and to explore the reliability of an examinee's self-report. The guidelines also stress the PPG should not be used as the sole criterion for any decisions regarding an examinee, and it would be unethical to use it as the sole data point or to say that a person was guilty of a crime. (TT, pp. 43-45; R., pp. 43-45).

Dr. Gottfried stated the Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed. (DSM-5), also recognizes the PPG can be used to compare the person's normal sexual interests to paraphilic interests. The DSM-5 further states the PPG is "[t]he most thoroughly researched and longest used" psychophysiological measure of sexual interests, "although the sensitivity and specificity of diagnosis may vary from one site to another." (TT, pp. 45-47; R., pp. 45-47).

Dr. Gottfried testified that a book published in 2019, Sexually Violent Predators Clinical Science Handbook, has a chapter (Chapter 15) entitled "The Use of Penile Plethysmography in SVP Assessment and Treatment Decision Making," which states the use of the PPG is important in both evaluating and treating sex offenders being considered for civil commitment under sexual predator laws because research has found the identification of deviant sexual arousal is a

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work, other countries have started using some of the stimuli currently used throughout the U.S., but they continue to use child pornography as well. (TT, pp. 42-43; R., pp. 42-43).

significant predictor of sexual recidivism. She further testified the PPG is generally accepted in the mental health community as evidenced by the literature from ATSA, the DSM-V, FDA approval of the Limestone hardware system, which the SBCL uses, and recognition of the PPG as a medical test by the Federal Drug Administration, Medicare and Blue Cross/Blue Shield. (TT, pp. 48-50; R., pp. 48-50).

Dr. Gottfried acknowledged there are criticisms of the PPG regarding standardization, offenders who do not show expected arousal patterns, and consistency with self-reported arousal patterns. She testified that the 2019 book included data from fifty-three studies and almost 9500 men, and it addressed many of the standardization issues, including the type of stimuli used, interpretations using standardized scores, and whether predictive effect sizes were strong or stronger than most risk factors for sexual recidivism. (TT, pp. 50-52; R., pp. 50-52).

Dr. Gottfried then explained that “sensitivity is true positive,” such as “someone is aroused by children and the PPG shows that they are aroused by children,” which is a “true positive.” “Specificity is a true negative, where the person is not aroused by children and the PPG shows that they are not aroused.” Dr. Gottfried explained that the SCBL uses the conservative cut score, which may result in more false negatives, rather than risking false positives in a high stakes evaluation. (TT, pp. 52-54; R., pp. 52-54).

The SBCL uses two stimuli sets, the Marshall set, which is older and consists of audio only, and the Real Child Voices (RCV) set. RCV, which consists of slides plus audio. The RCV set is standard on all Limestone Technology PPG hardware, and at least fifty labs across the country use it, including sexual predator programs in Minnesota, California, New York, Illinois and Missouri. Dr. Gottfried testified the 2019 meta-analysis found the slide plus audio was the preferred and most valid way to administer a PPG, and the RCV set has been studied and been the

subject of peer reviewed presentations at multiple scientific conferences. (TT, pp. 54- 58; R., pp. 54-58).

The SBCL saw Appellant twice in February 2020, and completed the evaluation in April 2020 after COVID related delays. Appellant consented to the evaluation, including the PPG. On psychological tests, Appellant's results indicated defensiveness or deception, he denied all his sexual offenses, including the ones he pled guilty to, and denied any sexual arousal. He also provided inconsistent information between the SBCL and DMH evaluations, as well as between the days of the SBCL evaluation. (TT, pp. 59-61; R., pp.59-61).

On cross-examination, Dr. Gottfried testified there were multiple studies looking at the specificity and sensitivity of the PPG, which dealt with false negatives and false positives, and established the margin of error for the PPG. She stated any test can theoretically be manipulated, and the SBCL uses a conservative cut score to minimize the possibility of false positive results. (TT, pp. 73-77; R., pp. 73-77).

The circuit court found the PPG evidence was admissible under the factors outlined for scientific evidence in case law. Specifically, the court found Dr. Gottfried's testimony established the PPG was subject to peer review, the subject of numerous publications, and recognized in the DSM-5. (TT, pp. 89-91; R., pp. 89-91).

The court further found the PPG is used in over fifty labs in various parts of the country. The court acknowledged there are different standards between the United States and other countries, but there is standard application in the United States. (TT, pp. 90-91; R., pp. 90-91).

As to quality control procedures, the court found the SBCL uses various methods to determine an appropriate baseline for the test, and uses a conservative threshold of arousal. Dr.

Gottfried gave a detailed explanation of how the baseline is established and the test procedure. (TT, p. 91; R., p. 91).

The court found the testimony indicated the RCV set is standard and provided by the manufacturer, the SBCL use standard instructions provided by the manufacturer, and there are methods in place to prevent test manipulation. The court also noted Dr. Gottfried testified the PPG is only one data point considered, and it does not preclude other considerations. (TT, pp. 91-92; R., pp. 91-92).

Finally, the court found that many of Appellant's arguments regarding the PPG went to the weight of the testimony, not admissibility. The court noted the ruling was without prejudice to Appellant's ability to challenge the weight and sufficiency of the evidence. (TT, p. 92; R., p. 92).

Before the jury, Dr. Gottfried was qualified as an expert in forensic psychology. She testified regarding Appellant's evaluation process, including the tests administered and what she considered in reaching her conclusions. She reviewed Appellant's criminal history, including his qualifying convictions under the SVPA, and stated his scores on actuarial risk assessment tools were in the well above average risk to reoffend category. In addition, Appellant exhibited several dynamic risk factors for reoffending not considered in the actuarial risk assessments. (TT, pp. 92-134; R., pp. 92-134).

Dr. Gottfried diagnosed Appellant with antisocial personality disorder, narcissistic personality disorder and paraphilic coercive disorder. She testified that the combination of Appellant's personality disorders and paraphilic disorder "significantly increase his risk for future sexual violence." She opined to a reasonable degree of psychological certainty that Appellant has serious difficulty controlling his propensity to commit sexually violent offenses, and poses a

danger to the health and safety of others if not committed for long term control, care and treatment. (TT, pp. 134-144; R., pp. 134-144).

Appellant presented testimony from Rozanna Tross, Psy.D., who evaluated him as the court appointed evaluator when she worked for DMH. She ascribed Appellant's criminal behavior to his early lifestyle and upbringing, rather than a personality disorder or mental abnormality. She concurred with Dr. Gottfried's testimony that Appellant scored in the well above average risk to reoffend category on the actuarial risk assessment tools, as well as Appellant's defensiveness, his minimization of his level of responsibility, and his dynamic risk factors. Dr. Tross opined Appellant did not have any personality disorders or mental abnormalities that would qualify him for commitment under the SVPA. (TT, pp. 170-227; R., pp.170-227).

The circuit court found the State had proven beyond a reasonable doubt that Appellant is a sexually violent predator, and ordered that he be committed to DMH for long term control, care and treatment. (Order of Commitment filed June 25, 2021; R., p. 283). This appeal followed.

## STANDARD OF REVIEW

“The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice.” State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009). Appellate courts are bound by fact findings in response to pre-trial motions regarding the admissibility of evidence when the findings are supported by the evidence and not clearly wrong or controlled by error of law. State v. Miller, 375 S.C. 370, 652 S.E.2d 444, 448 (Ct. App. 2007).

“The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion.” State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020) (*quoting* State v. Chavis, 412 S.C. 101, 771 S.E.2d 336, 338 [2015]). “A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion,” which “occurs when the conclusions of the [trial] court are either controlled by an error of law or are based on unsupported factual conclusions.” *Id.* (alteration in original).

## ARGUMENT

**The circuit court did not abuse its discretion in admitting evidence regarding a penile plethysmograph test performed by the State's expert, which she used as one factor in formulating her opinion, because the evidence established penile plethysmography is recognized and accepted in the field of sex offender evaluation and treatment as a reliable, objective measure of deviant sexual interest.**

Citing dicta from In re Bilton, 432, S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), Appellant contends the circuit court erred in admitting Dr. Gottfried's testimony regarding the PPG conducted as part of the comprehensive psychosexual evaluation of Appellant's mental status and risk to reoffend. In addition to relying on dicta from Bilton, Appellant's contention is premised

on an extremely truncated and misleading version of Dr. Gottfried's testimony regarding the PPG (which was virtually undisputed).<sup>2</sup>

The SVPA created a non-punitive, civil process for the commitment and treatment of sexually violent predators. In re Care & Treatment of Canupp, 380 S.C. 611, 671 S.E.2d 614, 617 (Ct. App. 2008) (*citing* In re Matthews, 345 S.C. 638, 550 S.E.2d 311, 316 [2001] [the United States Supreme Court deemed Kansas' Sexually Violent Predator Act, on which the South Carolina Act is modeled, to be a civil, non-punitive scheme]); In re Care and Treatment of Brown v. State, 372 S.C. 611, 643 S.E.2d 118, 121 (Ct. App.2007). "The Act is designed to: (1) meet the special needs of sexually violent predators; (2) address the significant likelihood that they will engage in repeated acts of sexual violence if not treated for their mental conditions; and (3) assess the risks requiring their involuntary civil commitment in a secure facility for long-term control, care, and treatment." Brown, 643 S.E.2d at 621 (*citing* S.C. Code Ann. §44-48-20). A "person's dangerous propensities are the focus of the SVP Act." In re Care & Treatment of Ettl, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008) (*quoting* In re Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451, 453 [2003]).

Rule 702, SCRE, provides that expert opinion testimony is admissible if it will assist the trier of fact to understand evidence or determine a fact in issue. Rule 703, SCRE, provides that facts or data on which an expert bases an opinion or inference perceived by or made known to the expert need not be otherwise admissible in evidence if the facts or data are of a type reasonably relied on by experts in the particular field.

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<sup>2</sup>The parsing of Dr. Gottfried's testimony is demonstrated by Appellant's frequent citation to only two to five lines out of an entire page of testimony, with no context at all. Understanding the context and meaning of Dr. Gottfried's testimony about a complex scientific process, how it is used, and any on-going issues regarding standardization, requires consideration of testimony beyond the limited parts cited by Appellant is required.

In determining the admissibility of scientific evidence, the court must consider several factors, including: (1) publications and peer review regarding 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. State v. Jones, 343 S.C. 562, 541 S.E.2d 813, 819 (2001). This type of evidence is also subject to attack for relevancy and prejudice, and once the evidence is admitted, the jury may give it such weight as it deems appropriate. State v. Council, 335 S.C. 1, 515 S.E.2d 508, 517-518 (1999).

In this case, the circuit court heard extensive, undisputed testimony from Dr. Gottfried regarding the reliability of the PPG, including her first-hand experience and certifications with the PPG, research studies and publications concluding the PPG is reliable and a valuable tool in sex offender evaluations and treatment, as well as how Appellant's PPG test results were relevant to Dr. Gottfried's ultimate opinion. Based on the evidence, the court then made findings as to each of the requirements for admission of scientific evidence, which are amply supported by the record.

#### **A. Publications and Peer Review of the Technique**

Dr. Gottfried has extensive first-hand experience with the PPG, and is certified to administer PPG tests, and read and interpret PPG results. She supervises a department at MUSC that includes a PPG lab with the highest possible certifications and highly trained personnel to operate the PPG machine and software. She is involved in national and international organizations regarding behavioral sciences, and sits on a committee working to establish international standards for administering and interpreting PPG results. She testified the PPG has been the subject of numerous peer reviewed articles, book chapters and conference presentations, including an article published approximately one week before the trial in this case. In addition, Dr. Gottfried was

personally involved in authoring and/or presenting some of the peer reviewed literature, and she presented at professional conferences about use of the PPG in sex offender evaluations. (TT, pp. 30-37; R., pp. 30-37).

Dr. Gottfried further testified the DSM-5 recognizes the PPG as the most thoroughly researched and longest used objective measure of sexual attraction to children, and ATSA's practice guidelines recognize the PPG as a means to obtain objective behavioral data not readily established with other assessment means. (TT, pp. 43-47; R., pp. 43-47). In addition, the 2019 book chapter she referenced included an extensive meta-analysis of studies involving thousands of male sex offenders, and concluded the PPG is important in both evaluating and treating sex offenders being considered for civil commitment under sexual predator laws because research has found the identification of deviant sexual arousal is a significant predictor of sexual recidivism. (TT, p. 49; R., p. 49).

Appellant dismisses the June 2021 Nature article as "not relevant to [the PPG's] use in this case." The fallacy in Appellant's dismissiveness is it assumes evidence reflecting the PPG's reliability and validity is relevant only if it relates to sexual predator proceedings. As Dr. Gottfried testified, the PPG is used in the general male sexual health arena for things such as erectile dysfunction, sexual health and wellness. (TT, pp. 36-37; R., pp. 36-37). Literature discussing the PPG's reliability in medical evaluations and treatment unrelated to sexually violent predator evaluations is clearly relevant and important to the court's consideration of admissibility.

### **B. Prior Application of the Method Involved**

Dr. Gottfried testified about the science involved in a PPG test, including how the PPG works, what it is intended to measure, and how it is conducted. She candidly acknowledged certain standardization issues remain, particularly internationally, but testified the PPG is now recognized

in the DSM-5 as the most thoroughly researched and **longest used** psychophysiological measures of sexual interests, and ATSA includes the PPG in its standard guidelines for sex offender evaluations. In addition, the 2019 book chapter considered studies involving thousands of cases in which the PPG was used. (TT, pp. 39-52; R., pp. 39-52). Clearly, the evidence showed the PPG has been used and studied numerous times.

The circuit court specifically found the PPG is used in over fifty labs across the country, and the testimony indicated there was standard applications used in those labs. (TT, pp. 90-91; R., pp. 90-91. Dr. Gottfried's undisputed testimony amply supported the circuit court's findings as to this factor.

### **C. Quality Control Procedures**

Dr. Gottfried testified the MUSC PPG lab uses multiple quality control measures. All lab personnel are trained and certified by the machine manufacturer, and are credentialed to perform their part of the tests. Each gauge is calibrated multiple times using the same method, and the machine software does not allow a test to begin until the gauge is properly calibrated. There are countermeasures to ensure everything is reliable and performed in the same way, including sound checks to make sure all the sound equipment is working properly, and the humidity and temperature inside the lab is controlled. The lab uses standardized instructions from the manufacturer for every PPG test it conducts, and every step in the process from administration to analysis is performed in the same standardized way. In addition, the SBCL uses a conservative cut score to minimize the risk of a false positive result. (TT, pp. 39-41; R., pp. 39-41).

Appellant claims Dr. Gottfried's testimony regarding quality control was "sparse and mainly revolved around the procedures used at the MUSC lab," but she "was unable to testify regarding how the test is administered in other labs around the country." To the contrary, Dr.

Gottfried's testimony on this issue was very detailed rather than "sparse," and it is understandable why she gave details regarding the SBCL's PPG administration because she is in charge of the lab and is certified on every step of the process. She testified the Limestone Technologies PPG system used in the SBCL is currently used by between fifty to one hundred labs across the country, and the system is sold with the same standardized instructions on quality control and use. Dr. Gottfried could no more testify regarding the procedures actually used in other unidentified labs than a DNA expert could testify regarding actual procedures used in other unidentified DNA labs.

#### **D. Consistency of the Method with Recognized Scientific Laws and Procedures**

Dr. Gottfried testified about the physiological responses the PPG is designed to measure, how the PPG machine and software measures those responses, and multiple labs across the country and internationally use standard PPG equipment and stimuli. In addition, to recognition by the DSM-5 and ATSA, Dr. Gottfried testified the PPG is recognized as a valid medical test by the federal Food and Drug Administration, Medicare and major insurance companies such as Blue Cross/Blue Shield. She stated studies involving the PPG's specificity and sensitivity (false negatives and false positives) have determined the PPG's margin of error, and many such studies have concluded the PPG is a valuable tool in the assessment and treatment of general male sexual health as well as sex offenders. (TT, pp. 41-58, 73-77; R., pp. 41-58; 73-77). *See e.g.*, Murphy, L., *et. al.*, Standardization of Penile Plethysmography in Assessment of Problematic Sexual Interests, J. Sex. Med. 12(9): 1853-1861 (2015) (PPG "is a widely recognized means of measuring male sexual arousal to given stimuli," and "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."); *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”, and although it is not universally embraced, “there nonetheless remains widespread acceptance and recognition of the value of phallometric assessment”) (emphasis added); 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.”).

In the face of mere conclusory assertions regarding purported deficiencies in Dr. Gottfried’s testimony, Appellant’s only specific contention is his PPG test was unreliable because it included all the RCV stimulus sets, including sets that did not reflect the type of victim Appellant offended against in his sexual offenses, and Dr. Gottfried testified she now tailors the stimulus sets used in a particular PPG to focus on specific victim types based on the offender’s offense history. He asserts this somehow exemplifies PPG standardization problems and renders the PPG

unreliable, an assertion that is a red herring attempting to distract from the entirety of Dr. Gottfried's testimony and create a problem totally unrelated to her testimony.

The on-going standardization issues Dr. Gottfried acknowledged and discussed were primarily international differences particularly regarding the use of child pornography as a stimulus set during the test. The fact that a particular PPG may include all of the available stimulus sets rather than only some of the sets has nothing to do with the overall reliability of the PPG as a recognized and accepted test. A medical doctor may order blood tests for a patient that are tailored to look for certain results and not others, but that does not render the blood tests unreliable.<sup>3</sup>

Notwithstanding the dicta in Bilton claiming near uniformity of other jurisdictions excluding the PPG, courts, including South Carolina circuit courts,<sup>4</sup> have recognized the general acceptance and admissibility of the PPG in sexually violent predator cases. In In re Detention of Halgren, 156 Wash. 2d, 132 P.3d 714 (2006), the Washington Supreme Court found PPG results were admissible as part of the diagnostic process, and the PPG testimony would assist the jury in understanding the expert's sexual deviancy diagnosis. *Id.* at 719. The court further found the issue of the PPG's reliability goes to the weight of the evidence rather than its admissibility *Id.*; *see also* In re Detention of Herrick, 198 Wash. App. 439, 393 P.3d 879, 885 (2017), *aff'd*, 190 Wash. 2d 236, 412 P.3d 293 (2018)(same).<sup>5</sup>

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<sup>3</sup>Logically, any test focused on certain known factors arguably takes less time and is more reliable than a broad test including factors that may be unrelated to the person being tested, but even if true, that does not render the broader test unreliable.

<sup>4</sup>In re Ronald MJ Gregg, 2018-CP-10-03472 (Jefferson, J.); In re Shawn Torlif Daily, 2019-CP-42-03230 (Kelly, J.); In re James Lewis Williford, 2019-CP-04-01380 (Sprouse, J.); In re Andy Eugene Hyman, 2020-21-01045 (Henderson, J.); In re Wiley L. Chapman, 2020-CP-13-00764 (Holt, J.). The PPG evidence has been excluded in three cases.

<sup>5</sup>Significantly, Washington's sexual predator statute expressly gives the courts the discretion to order the person to comply with a PPG if requested by the evaluator. 412 P.3d at 295-296; RCW §71.09.050(1). Thus, the Washington legislature recognized the PPG was a valuable tool evaluators should be able to use if necessary.

The Illinois appellate court also found PPG evidence was admissible in In re Commitment of Sandry, 367 Ill.App.3d 949, 858 N.E.2d 295 (2006). As to the admissibility of a particular test or methodology, the court stated: “once it is determined that a methodology is generally accepted, it follows that it has achieved a sufficient degree of reliability and validity to cross the threshold of admissibility.” *Id.* at 309. The court then engaged in an exhaustive analysis of case law (use of PPG mentioned in at least 21 states, including South Carolina), statutes [eleven state statutes] and regulations). *Id.* at 310-313.

The court also discussed numerous academic articles, which it determined provided ample support “to conclude that PPG testing is accepted by a substantial number of experts in this field such that it may be used to support a qualitative assessment of the future dangerousness of an individual.” *Id.* at 309-316. Acknowledging some experts have criticized and rejected PPG testing, the court noted the existence of contrary authority is not dispositive because many people could disagree on the acceptance of any given methodology, but those who accept it may still constitute a significant subset of experts in any given field. *Id.* at 316; *see also State v. Graham*, 275 Kan. 176, 183, 61 P.3d 662, 667 (2003) (some disagreement in the scientific and medical community as to the reliability of a particular test method is a matter affecting the weight of such evidence and not its admissibility; such evidence is admissible if a qualified expert witness testifies the particular test method is reliable and accurate, and it is generally accepted as such by other experts in the field).

Finally, Appellant asserts the prejudicial effect of the PPG evidence substantially outweighed the evidence’s probative value, particularly as it related to his responses to RCV stimulus sets involving children, which was outside his offending pattern, and therefore, it should have been precluded pursuant to Rule 403, SCRE. As a threshold matter, the first reference to

Appellant's arousal to the child stimulus sets was in response to a question Appellant asked during cross-examination in the pre-trial hearing, Dr. Gottfried's response was brief, and she specifically stated she essentially discounted those results because nothing in Appellant's history indicated a pedophilic disorder. (TT, pp. 70-72; R., pp.70-72). Then, during her trial testimony, Dr. Gottfried merely listed the names of the stimulus sets he responded to, and then stated most of the scenarios she considered clinically significant for Appellant "were to coercion or sexual violence, which is consistent with the reported offense behaviors."<sup>6</sup> (TT, pp. 122-123; R., p. 122-123).

Appellant concedes his trial was a bench trial, but contends the PPG evidence was "greatly prejudicial, even to the court." "It is well-established that it is a near insurmountable burden for a defendant to prove prejudice in the context of a bench trial as a judge is presumed to disregard prejudicial or inadmissible evidence." State v. Inman, 395 S.C. 539, 720 S.E.2d 31, 45 (2011) (citing People v. Jackson, 949 N.E.2d 215, 229 [2011][the danger of prejudice is lessened in a bench trial]). While the PPG evidence in this case was prejudicial to Appellant, that prejudice did not outweigh the highly probative value of it in light of the issues of mental status and risk to reoffend that the circuit court was called upon to decide in this case.

When Dr. Gottfried's undisputed testimony is considered as a whole, it amply supports the circuit court's findings regarding the reliability of the PPG and its admissibility as evidence. Accordingly, the circuit court's ruling and Appellant's commitment as a sexually violent predator should be affirmed.

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<sup>6</sup>The sets Appellant showed clinically significant arousal to were "coercion of a female child, violence against a female child, female infant, coercion or rape of an adult woman." (TT, pp. 122-123; R., pp. 122-123).

## CONCLUSION

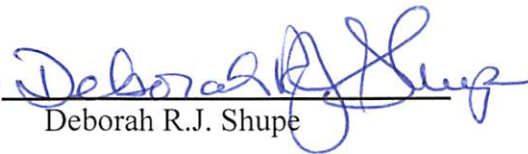
Based on the foregoing reasons, the State respectfully submits the Court should affirm the circuit court's admission of the PPG evidence, its ultimate finding Appellant is a sexually violent predator as defined by the SVPA, and the order committing Appellant to DMH for long term control, care and treatment.

Respectfully submitted,

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July 26, 2022

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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Anderson County  
The Honorable R. Scott Sprouse, Circuit Court Judge  
Appellate Case No. 2021-000249

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In the Matter of the Care and Treatment  
of James L. Williford,

Appellant.

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**CERTIFICATE OF COUNSEL**

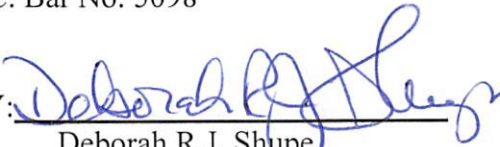
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The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive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

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