

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Charleston County  
The Honorable Deadra A. Jefferson, Circuit Court Judge  
Court of Appeals Appellate Case No. 2019-001945  
Opinion No. 2022-UP-336

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**RECEIVED**

**Jan 30 2023**

S.C. SUPREME COURT

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

RESPONDENT.

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**PETITIONER'S REPLY TO RETURN TO PETITION FOR  
WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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## INDEX

Argument .....	1
Conclusion .....	8

## ARGUMENT

Respondent begins his Return with a faulty premise. He asserts the issue of whether PPG testing evidence is admissible “was not litigated at trial nor before the Court of Appeals.” He then attempts to narrow this Court’s focus to evidence regarding a single component of the PPG test – “the stimulus set.” (Return, p. 4). Contrary to Respondent’s assertions, the reliability of PPG testing methodology for purposes of determining admissibility of PPG test evidence was the exact issue raised before, and ruled on by, Judge Jefferson, and subsequently considered by the court of appeals. Respondent’s attempt to limit the focus of this Court’s review to the RCV stimulus set does not make his position any stronger, as he is quite wrong in this argument even on that single component of the PPG testing, but it is very telling for several reasons.

Initially, Respondent attempts to differentiate between PPG test “hardware” and “software,” and argues the State spent “the vast majority of its petition for certiorari describing the hardware used in a PPG and how the hardware has been peer-reviewed and that the hardware is reliable.” This argument ignores the fact the PPG test “hardware” cannot operate without the “software,” including the stimulus sets, and the PPG test system utilized in this case, including hardware and software, has been subjected to the approval process of government agencies and at least one major insurance company, as well as the subject of extensive studies over many years.

Further, since the reliability of PPG test methodology in general was the focus of the issue presented to Judge Jefferson and the substance of her findings and conclusions, setting forth the evidence before Judge Jefferson regarding the PPG test methodology for purposes of this Court’s consideration was critical. Indeed, Respondent does not even attempt to argue against the

extensive testimony establishing that the PPG test methodology has been studied and supported by numerous “peer-reviewed” published articles.<sup>1</sup>

Respondent’s argument the court of appeals “correctly focused on this issue” appears to reference his current focus on the RCV stimulus set, but it fails to address the real deficits in the court of appeals analysis as set forth in the Petition for Writ of Certiorari. Even his argument on that narrow focus depends on assertions not supported by the record.

As a threshold matter, Respondent’s assertion Dr. Gottfried’s lab “created and sells the stimulus set” is patently inaccurate, and the cited portion of the Record on Appeal does not even arguably support it. There is absolutely **no** evidence, and none exists, that MUSC in any way “created,” “sells” or financially benefits in any way from the RCV stimulus set, which is included in every Limestone PPG test system purchased. MUSC simply purchased the well established Limestone system for its lab, and received the RCV stimulus set like every other purchaser.

Further, if, as Respondent asserts, the court of appeals focused only on the RCV stimulus set rather than the PPG testing methodology in general, its specific findings requiring peer review and/or findings of reliability for the “Limestone certification standards” and “MUSC’s PPG procedures” could only be irrelevant and nonsensical. The Limestone certification standards and MUSC’s PPG test procedures are relevant only to the general reliability of the PPG testing methodology, not the RCV stimulus set specifically.<sup>2</sup>

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<sup>1</sup>Respondent erroneously describes the record and testimony throughout his Return. He incorrectly resorts to gross simplification of how the PPG test “hardware” works, and inaccurately asserts the person is “forced” to place the strain gauge around his penis. There is no force involved in any aspect of the PPG test.

<sup>2</sup>These findings in the court of appeals opinion alone reveal the fallacy of Respondent’s argument that reliability of PPG testing in general was not raised before Judge Jefferson or in the court of appeals. As stated in the Petition, the reliability of the Limestone certification standards and MUSC’s PPG protocols was not challenged in the circuit court or the court of appeals, but the court of appeals used them as a basis to find the PPG test evidence was not admissible.

Even assuming the court of appeals did “focus” only on the RCV stimulus set, however, it still completely overlooked substantial, and virtually undisputed, evidence that the RCV stimulus set has been peer reviewed via multiple study abstracts regarding the reliability of the RCV stimulus set that have been submitted for presentations at scientific conferences, peer reviewed, and approved for presentation purposes. (R., pp. 119-121, 134-138, 328-331, 334-337). Respondent continues the court of appeals’ failure to address this evidence by asserting the court of appeals “correctly found a complete lack of peer review” of the RCV stimulus set, which is absolutely contrary to the evidence presented to Judge Jefferson. As noted in the Petition, there are multiple avenues for a scientific test to be “peer reviewed,” including peer review of abstracts regarding the test methodology submitted for the scientific conference presentations.

In focusing solely on the RCV stimulus set, Respondent attempts to distract this Court from the fact that MUSC also used the Marshall stimulus set. The Marshall stimulus set has been used for many years and been the subject of numerous “peer reviewed” articles endorsing it, which Judge Jefferson expressly noted in ruling on the PPG test reliability issue. (R., pp. 111, 216, 330). Respondent asks this Court to do the same thing the court of appeals did – completely ignore that undisputed evidence.

Respondent also attempts to discount the evidence before Judge Jefferson by taking testimony by Dr. Gottfried and a statement by the State during arguments completely out of context. Such artificial isolation leads to misapprehension of the actual evidence and argument.

As conclusive evidence the RCV stimulus set is not reliable, Respondent cites to one single exchange during Dr. Gottfried’s cross-examination about the existence of peer reviewed studies regarding the RCV stimulus set’s ability to predict whether people have coercive paraphilic

disorder (Return, pp. 5-6).<sup>3</sup> The absence of specific research regarding the connection between the RCV stimulus set and a specific paraphilic disorder does not render the stimulus set unreliable as part of a PPG test in general. Dr. Gottfried testified her coercive paraphilic disorder diagnosis and risk assessment evaluation of Respondent were not premised on the PPG test results alone, but the results were only one data point she considered with other available evidence, including criminal history, psychological tests results, and Respondent's statements during a clinical interview. (R., pp. 100-101, 114, 340-341, 386).

Respondent also takes the State's purported concession regarding the lack of specific peer review of the RCV stimulus set completely out of context. Just prior to the statement Respondent quotes, the State expressly argued that the "main issue" was whether "the underlying science reliable." The quoted statement was immediately followed by "she did represent peer review and multiple articles on the general acceptance of the PPG, the concept as a whole, the fact that it shows arousal." (R., pp. 161-162) (emphasis added).

Considered in context, the purported concession was referencing the admitted lack of peer reviewed articles regarding the RCV stimulus set, not that the stimulus set had not been peer reviewed in any way.<sup>4</sup> More importantly, the entirety of the State's argument undermines Respondent's current assertion that the issue of reliability and admissibility of PPG test evidence

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<sup>3</sup>Respondent alludes to "another stimulus set" used in his PPG test, which is apparently a veiled reference to the Marshall stimulus set. By failing to even name the Marshall stimulus set, Respondent attempts to avoid the court of appeals' failure to acknowledge MUSC uses the well established and peer reviewed Marshall stimulus set in all the PPG tests it administers, including Respondent's test, which Judge Jefferson cited as support for her findings regarding reliability and admissibility.

<sup>4</sup>Such a concession would have been contrary to evidence the State presented expressly indicating the RCV stimulus set had been peer reviewed by way of study abstracts for presentations at multiple scientific conferences.

in general was not litigated before Judge Jefferson because it makes clear that was exactly the issue presented to and ruled on by Judge Jefferson.

Respondent asks this Court to simply dismiss the court of appeals misconstruing the factors regarding reliability and admissibility set forth in Jones/Council, and overlooking significant evidence in the record that Judge Jefferson expressly cited in support of her findings and ultimate conclusion that the PPG test methodology was reliable and evidence regarding the PPG test results was admissible. Respondent cavalierly claims this Court “should not take the State’s bait” and consider a “sweeping pronouncement” regarding the admissibility of PPG test evidence based on the record in this case.

The only “bait” the State presents to this Court is extensive competing testimony from two experts regarding the reliability of PPG testing methodology in general, as well as virtually undisputed expert testimony regarding the reliability of the RCV stimulus set specifically. The only issue presented to Judge Jefferson was the general reliability and admissibility of the PPG testing methodology, and the evidence before her went directly to that issue. As contemplated by Jones/Council, Judge Jefferson viewed the evidence in light of the reliability of the “science” behind the PPG test methodology as a scientific test or technique, and made detailed findings and conclusions regarding each Jones/Council factor. (R., pp. 179, 212-219).

This Court’s consideration of the case will not simply involve a “rote application of the rules regarding the admission of scientific evidence in an unpublished opinion.” While it is true the court of appeals opinion is unpublished, and as such cannot be cited as precedential authority, the intent of the court of appeals opinion to exclude all PPG test evidence regardless of the evidence before the circuit court was clear. There are several SVPA cases pending in circuit court that involve PPG test evidence, and the court of appeals opinion will likely be referenced as

“persuasive” authority against admission of the evidence in those cases. Thus, contrary to Respondent’s attempt to lessen the importance of the court of appeals opinion, it is a “grand ruling” about the general admissibility of PPG test evidence in SVPA cases, and given the extent to which the court of appeals ignored Judge Jefferson’s detailed findings and conclusions, circuit court judges now know they face almost certain reversal in the appellate court if they admit PPG test evidence.

The assumption of reversal is supported by the court of appeals unpublished opinion’s citation to dicta from In re Bilton, 432, S.C. 157, 851 S.E.2d 442 (Ct. App. 2020). The Bilton court expressly disavowed any conclusion regarding the admissibility of PPG evidence in general, stating the issue before it was “narrow,” and holding “due process does not allow a testifying expert to be a pipeline for someone else’s scientific work to be admitted into evidence without a baseline demonstration of reliability.” *Id.* at 445-446 (emphasis added). The baseline demonstration of reliability Bilton required is exactly what Judge Jefferson had before her in this case, but the court of appeals ignored it, and this Court should address the court of appeals’ failure to adhere to the established standard of review in this case.

In addition, there are three SVPA appeals currently pending in the court of appeals in which the only issue is the admission of PPG test evidence based on similar expert testimony. In light of Bilton, the unpublished opinion in this case, and pending cases in both the appellate and circuit courts in which the admissibility of PPG test evidence is at issue, it is assured this Court will ultimately have to decide that issue. It should do so now on this developed record in order to end the uncertainty that presently exists.

This case presents an opportunity for this Court to address the important issue of reliability of PPG testing methodology and admissibility of PPG test evidence, specifically in SVPA cases

where the person's **propensity** to commit future acts of sexual violence is the ultimate issue. Accordingly, the State requests this Court grant a writ of certiorari to review the court of appeals decision in this case.

**CONCLUSION**

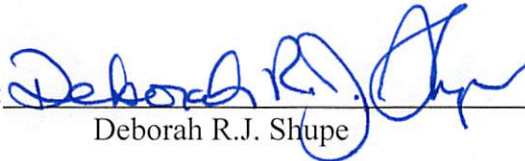
Based on the foregoing and the matter set forth in the Petition for a Writ of Certiorari, the Brief of Respondent, the Petition for Rehearing and Petition for Rehearing *En Banc*, the State submits this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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