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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
The Honorable R. Keith Kelly, Circuit Court Judge  
Appellate Case No. 2022-000371

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IN THE MATTER OF THE CARE AND TREATMENT  
OF SHAWN TORLIF DAILY,

APPELLANT

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**FINAL BRIEF OF RESPONDENT**

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## **STATEMENT OF ISSUE ON APPEAL**

Judge Kelly did not abuse his discretion in admitting evidence regarding a penile plethysmograph test performed by the State's expert, which she used 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 interests.

**STATEMENT OF THE CASE**

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

## STATEMENT OF FACTS

In 2010, Appellant Shawn Torlif Daily pled guilty in Spartanburg County to three counts of lewd act on a minor, and was sentenced to fifteen years incarceration on each count, suspended upon service of ten years and five years probation. Two of the sentences were consecutive, and the third was concurrent. Prior to Appellant's release from incarceration, Respondent State of South Carolina commenced proceedings pursuant to the Sexually Violent Predator Act (SVPA) seeking Appellant's commitment to the South Carolina Department of Mental Health (DMH) for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on March 14, 2022, before the Honorable R. Keith Kelly, Circuit Court Judge.

Prior to trial, Appellant moved to exclude any testimony by the State's expert regarding a penile plethysmograph (PPG) performed during a comprehensive psychosexual evaluation of Appellant's mental status and risk to reoffend sexually. (Notice of Motion and Motion to Suppress Testimony Related to PPG Testing and Results, filed December 29, 2021; Record on Appeal [R.], pp.410-415). The State filed a Memorandum opposing the Motion to Suppress. (State's Memorandum in Opposition to Motion to Suppress Testimony Related to PPG Testing and Results, with Exhibits A-D, filed March 10, 2022; R., pp. 416-432). Before swearing the jury, Judge Kelly conducted a full evidentiary hearing pursuant to State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), during which Emily Gottfried, Ph.D. of the Medical University of South Carolina (MUSC), testified for the State.

### **Pre-Trial Testimony and Ruling**

Dr. Gottfried is an Associate Professor of Psychiatry and Behavioral Sciences at MUSC, and the Director of MUSC's Sexual Behaviors Clinic and Lab (SBCL). In her capacity as Director, she oversees all SBCL administrative duties, and performs most of the forensic evaluations. She sits on the Executive Committee of the Association for Treatment of Sexual Abusers (ATSA),

chairs the ATSA Research Committee, and is president-elect of the American Psychological Association Division 12 (clinical psychology and assessment). She is a member of the South Carolina Association for the Treatment of Sexual Abusers, the American Psychological Association, the American Academy of Forensic Sciences, the Society for Personality Assessment, and other professional associations. She is also part of an international standardization research group focusing on the PPG. (Trial Transcript [TT], pp. 21-23; R., pp. 17-19).

Dr. Gottfried testified she has approximately thirty-six peer-reviewed publications or book chapters in peer-reviewed scholarly books. She has presented over sixty times at professional conferences, and gives trainings and webinar presentations to national and international universities. Four or five of her peer-reviewed publications, and ten to twelve of her conference presentations related specifically to the PPG. During her tenure at MUSC, Dr. Gottfried has requested PPG testing in approximately fifty-two evaluations for cases involving the SVPA, private pre-trial matters, federal probation of sex offenders, and licensing board cases. (TT, pp. 23-24; R., pp. 19-20).

Consistent with best practices in the field, Dr. Gottfried conducts a comprehensive evaluation that includes data from multiple sources. She conducts a clinical interview with the person, reviews all collateral information, including mental health records, medical records, detention center and prison records. She then conducts a battery of assessment measures, including the PPG, and scores the results on clinical rated assessment measures to look for risk factors and other factors to guide her clinical opinion. (TT, p. 25; R., p. 21).

Dr. Gottfried is specifically trained and certified by Limestone Technologies, which developed and manufactured the PPG system used at MUSC, to conduct and interpret PPG tests. The training includes classroom/online instruction on the history, background and literature of the

PPG test. After those classes, Limestone conducts two or three full day training sessions requiring actual administration and interpretation of PPG tests in real time. Before certification, Limestone then requires submission of PPG test results that are reviewed for accuracy. The SBCL has been certified as both a clinical and a research laboratory. (TT, p. 26; R., p. 22).

Dr. Gottfried testified a PPG test is only one data point she considers for evaluation purposes, but it is important because sexual arousal to nonconsensual or abusive stimuli is a strong predictor of sexual recidivism. People being evaluated may not be forthcoming about their sexual arousals, and the PPG test provides an objective measure of male sexual arousal, specifically whether they have a greater or equal level of arousal to deviant stimuli as they do to consenting adult scenarios. The PPG test has been peer reviewed in both the sex offender and general sexual behavior literature. (TT, pp. 27-29; R., pp. 23-25).

Everyone involved in the PPG test process at the SBCL is clinically certified to conduct their part of the test, and the SBCL has a standard protocol used in every PPG test performed there. The gauge used in a test must be calibrated three times before the test can start. The testing equipment and software includes countermeasures in the event the person does something that might interfere with the test results, *i.e.*, moving around, changes in breathing pattern, not paying attention, etc. The person is not required to masturbate before the test begins or allowed to touch his penis during the test, which would show up on the test and invalidate it. The SBCL uses a very conservative cut score of 5mm change in penis circumference for significant arousal, while Canada labs use a cut score of 1.5mm. (TT, pp. 30-33; R., pp. 26-29).

ATSA Practice Guidelines reference the PPG test in multiple places, stating that research supported assessment methods such as the PPG test may provide objective behavioral data that may not be readily established through other means, and supporting the responsible use of the PPG

test as a data point in sexual behavior evaluations and treatment. She stated “responsible use” means you do not administer a PPG test in the absence of any other data and then base an opinion regarding diagnosis or risk solely on the PPG test result. (TT, pp. 33-35; R., pp. 29-31).

Dr. Gottfried also testified the Diagnostic and Statistical Manual, 5<sup>th</sup> Ed., (DSM-5) recognizes use of the PPG test. In addition, a book published in 2019 entitled “Sexually Violent Predators: A Clinical Science Handbook,” includes a chapter (Chapter 15) entitled “The Use of Penile Plethysmography in SVP Assessment and Treatment Decision-Making,” written by Dr. Joseph Plaud, who is an expert on PPG testing. Dr. Plaud determined the PPG test is important in both the evaluation and treatment of individuals convicted of sex offenses and being considered for civil commitment as a sexual predator. Dr. Gottfried testified the PPG test is generally accepted in the mental health and medical field. (TT, pp. 36-40; R., pp. 32-36).

Dr. Gottfried acknowledged that standardization of PPG testing is an on-going issue arising primarily from the fact that some countries can do things other countries cannot do, and there are efforts to formulate international standards. Canada uses stimuli that include nude children, which labs in the United States cannot use, and countries do not want to change their methods just for purposes of international standardization. (TT, pp. 40-41; R., pp. 36-37).

Dr. Gottfried further testified it has been noted the PPG test does not always have expected results, i.e., someone with known offenses against children do not always show arousal to stimuli involving children during a PPG test. She stated men who sexually offend against children may do so for multiple reasons that are not due to sexual arousal to prepubescent children, so it would be expected that they would not show sexual arousal to children in the PPG test. A 2019 meta-analysis study considered multiple groups of men, including men who had sexually offended against children, men who had not sexually offended against children, men who had never been

arrested before, and men who had recidivated by committing a new sexual offense. The results indicated a “staggering” ability of the PPG to discriminate between the group of men who had offended against children and other groups.” (TT, pp. 41, 47-48; R., pp. 37, 43-44).

The SBCL uses a very conservative cut score of 5mm increase in penis circumference to measure significant sexual arousal to a stimulus set, which minimizes the possibility of false positive results. It also utilizes two stimulus sets, the Marshall set and the Real Child Voices (RCV) set. The Marshall set was developed a long time ago, and features a monotone male voice reading sexual scenarios featuring prepubescent, pubescent, adult and neutral stimuli, with coercion, persuasion, sexual violence and consenting adults. The RCV uses visual plus audio stimulus sets, which have been shown in large meta-analysis studies to be the best stimuli, and includes actors’ voices and sound effects featuring prepubescent, pubescent, adult, coercion, persuasion and neutral stimuli. Both sets are tailored to the person’s offending patterns, but all tests include the neutral and consensual adult stimulus sets. (TT, pp. 41-45; R., pp. 37-41).

Dr. Gottfried testified all PPG systems sold by Limestone include the RCV stimulus set, and it is used in between fifty and one hundred labs in the United States and Canada. It is also used in the sexually violent predator treatment programs in Minnesota, California, Illinois, New York and Missouri. (TT, pp. 45-46; R., pp. 41-42). The SBCL uses both the Marshall set and the RCV set in order to gather as much data as possible, and while the Marshall set has been used and studied for a long time, the literature suggests visual plus audio has the highest reliability. (TT, p. 47; R., p. 43). The RCV stimulus set has been peer reviewed, and studies have been approved for presentation at professional conferences. (TT, pp. 49-50; R., pp. 45-46).

Specifically regarding Appellant, Dr. Gottfried testified all the evaluators diagnosed him with pedophilic disorder, sexually aroused to female children, exclusive type, but Appellant never

admitted he was sexually aroused by children. The battery of assessment measures Dr. Gottfried used indicated Appellant tried to “self-preserve” and not admit any flaws within himself, so his self-report regarding his sexual arousal might not be as valid as someone who was not defensive. The PPG test was important to help determine whether Appellant was currently sexually aroused by children and had no strategies to mitigate his arousal. (TT, pp. 50-53; R., pp. 46-49).

On cross-examination, Dr. Gottfried confirmed the PPG test was part of the SBCL’s standard battery of tests performed in every evaluation of adult males sent to the lab for evaluation and/or treatment. The lab uses the PPG test because it provides physiological data regarding the person’s sexual arousal patterns. (TT, pp. 55-57; R., pp. 51-53).

Dr. Gottfried again testified the Marshall stimulus set has been used for a long time, and the SBCL uses a combination of the Marshall sets and the RCV stimulus sets. Dr. Bill Burke of Summerville, SC, and Musolf (not affiliated with MUSC) developed the RCV sets, which are included with every PPG system sold by Limestone. Dr. Burke has a volunteer faculty appointment at MUSC, and Dr. Gottfried collaborates with him. When asked if Dr. Burke makes a profit off the RCV sets sold, Dr. Gottfried testified: “I would assume so. I’m not privy to that.” (TT, pp. 59-62; R., pp. 55-58).

Judge Kelly took the matter under advisement. After jury selection the next day, Judge Kelly discussed the Council factors in determining whether to admit scientific evidence. On the issue of peer review, Judge Kelly found the PPG test has been peer reviewed and the subject of numerous publications, including the DSM-5. (TT, pp. 143-144; R., p. 139-140).

Judge Kelly found the PPG test is used in over fifty laboratories throughout the United States and some international labs. While there are different standards for some countries, Judge

Kelly found there is a standard application of the PPG test in the United States. (TT, p. 144; R., p. 140).

As to the quality control factor, Judge Kelly found the standards Dr. Gottfried testified about met the requirement, including the use of a conservative threshold that errs on the side of false negative results rather than false positive results. Dr. Gottfried's testimony regarding how the PPG test is administered also satisfied the quality control requirement. (TT, pp. 144-145; R., pp. 140-141).

Judge Kelly found Dr. Gottfried's testimony established the PPG testing method was consistent with recognized laws and procedures. Specifically, the SBCL uses standard instructions provided by the system manufacturer, as well as utilizing methods to prevent manipulation of the test data. Based on his findings, Judge Kelly found the PPG test evidence was admissible, and Appellant's arguments went to the weight of the evidence, not its admissibility. (TT, pp. 145-146; R., pp. 141-142).

### **Trial Testimony**

#### **Dr. Gottfried**

Before the jury, Dr. Gottfried was qualified as an expert in forensic psychologist in sexual offending behavior. She testified about her qualifications, and the protocol she follows in conducting pre-commitment evaluations under the SVPA. (TT, pp. 173-182; R., pp. 169-178).

In conducting Appellant's evaluation, Dr. Gottfried reviewed police and court documents related to his sex offenses, records related to Appellant's incarceration, Appellant's criminal history report, and the report from the initial evaluation conducted by a South Carolina Department of Mental Health (DMH) psychologist. She testified these are the type of records typically relied on by experts in her field. (TT, pp. 184-185; R., pp. 180-181).

Dr. Gottfried testified an individual's past behavior is the best predictor of future behavior, and for purposes of recidivism risk, it is important to look at the characteristics of prior offenses, including the facts of the offenses and victim characteristics, to determine if there is a pattern of behavior. She stated she considers all criminal offense allegations as a data point, and allegations that did not result in convictions do not get as much weight, but all of it is important for purposes of a possible diagnosis. As to Appellant, Dr. Gottfried found it significant that he did not have a nonsexual criminal history, and his criminal sex offenses were restricted to prepubescent females. (TT, pp. 185-187; R., pp. 181-183).

According to records Dr. Gottfried reviewed, Respondent was convicted in 2010 of three counts of lewd act with a child under the age of sixteen. The offenses occurred in 1992 or 1994, between 2002-2006 and approximately 2006-2008. He was also charged in 2010 with another lewd act offense, but pled guilty to assault and battery of a high and aggravated nature. Dr. Gottfried testified it is necessary to examine the underlying behavior behind the convictions as part of assessing whether there is a pattern of conduct that may indicate the person has a mental abnormality or personality disorder. (TT, pp. 187-193, State's Exhibits 1, 2 and 3 [Sentencing Sheets]; R., pp. 183-189, 521--529).

The records indicated the mother of a victim in one of the 2010 convictions (Z.G.) was an acquaintance of Appellant. Z.G. was six to seven years old at the time of the offenses in 1999, but did not disclose anything until 2008. She reported Appellant sexually touched and hurt her in various ways, including exposing himself to her, asking her to sit on his penis, waking up in Appellant's bed with no clothes on, putting his hand down her pants and rubbing her, and washing her between her legs very slowly while bathing her. When interviewed by law enforcement, Appellant said he did not remember anything like what the victim reported, but attempted suicide

two days later. Dr. Gottfried testified this began setting up a pattern of Appellant offending against prepubescent female children by assuming a caretaker role and using some grooming behaviors. (TT, pp. 193-195; R., pp. 189-191).

When Dr. Gottfried questioned Appellant about the Z.G. offenses, he initially said all he remembered was an allegation that he rubbed Z.G.'s buttocks underneath her underwear. He stated he was taking Ambien (sleeping medication) at the time, and he did not know if or when anything occurred, but he had "no doubt of their allegations." (TT, pp. 196-198; R., pp. 192-194).

Another of Appellant's 2010 convictions involved the daughter (S.B.) of a woman Appellant described as his female best friend. In 2006, when S.B. was approximately six years old, it was reported to law enforcement that Appellant inappropriately touched S.B. at the YMCA, but S.B.'s mother refused to allow law enforcement to interview S.B., so no charges were filed at that time. S.B. subsequently told her mother Appellant sat on the couch naked with a blanket over his lap and had S.B. sit on his lap and she could feel his penis. S.B. further disclosed that when she was with Appellant, he insisted on bathing her and would rub her chest while she was in the tub. S.B.'s mother confronted Appellant, who denied the allegations, and all contact between the mother, S.B. and Appellant ceased. In 2008, S.B.'s mother reported the abuse, which occurred from 2002 (age four) to 2006 (age 6). (TT, pp. 198-200; R., pp. 194-196).

Appellant told Dr. Gottfried that he babysat S.B. every three to four months and would either keep her at his house or take her to the YMCA pool because her mother wanted her to learn how to swim. He stated when they were at the pool, he would help SB put on or take off her bathing suit, and on one occasion S.B. leaned back and her hand touched his penis over his clothing. He again stated he had Ambien in his system and could not recall if he had an erection at that time. He denied the allegations about him sitting on the couch naked, stating he had "never

been unclothed around [SB] consciously, but he pled no contest to the charges because he had no way to refute the allegations and could not say if happened or it did not happen. Dr. Gottfried found the details significant because Appellant offended against a child while he was in a caretaking role, he was best friends with the child's mother, he groomed the child, and blamed the offenses on him not being in his right mind. (TT, pp. 200-203; R., pp. 196-199).

Appellant was also convicted of lewd act on a minor in connection with offenses against a third victim (B.H.) (State's Exhibit 3 [Sentencing Sheet]; R., pp. 527-529). According to records, B.H.'s mother dated Appellant for seven years, and met B.H. when she was four years old. B.H.'s mother reported that she and Appellant were never physically intimate during their seven year relationship. In 2009, the mother informed law enforcement that Appellant molested B.H. between 2006 and 2008 by digitally penetrating her vagina and rubbing her back in her "private area." When Dr. Gottfried asked Appellant about the allegations, he stated he had little recollection or memory because of taking more Ambien than he should have, and he could not refute the allegations. Dr. Gottfried found this offense significant because it involved another minor Appellant had access to through a relationship with the minor's mother, and Appellant assumed a caretaker role for the minor. (TT, pp. 203-207; R., pp. 199-203).

Appellant was charged with lewd act on a minor arising from an incident in 1994 or 1995 involving a four-year-old victim (B.J.) that was reported in 2009, and he pled guilty in 2010 to assault and battery of a high and aggravated nature. Records indicated Appellant knew B.J. because he had worked with her mother, and when B.J. was in the bathroom, Appellant touched her vagina and put her hand on his penis. When question by law enforcement in 2009, Appellant stated he had no memory of going to the location where the molestation occurred. Dr. Gottfried testified B.J. was Appellant's first victim, and the incident started Appellant's fifteen to seventeen

year pattern of offending against prepubescent females he had access to via relationships with their mothers. (TT, pp. 207-210; R., pp. 203-206).

Dr. Gottfried testified she also reviewed the mental health evaluation report by the DMH evaluator, and noted the evaluator used the same risk assessment measures she used and got the same results she did. The evaluator determined Appellant had other risk factors, including sexual preference for prepubescent children, a lack of emotionally intimate relationships with adults, emotional congruence with children, and some offense supportive attitudes. The evaluator also diagnosed Appellant with pedophilic disorder, but concluded he did not meet the criteria for civil commitment under the SVPA. (TT, pp. 210-212; R., pp. 206-208).

Dr. Gottfried then testified about the battery of tests she performs as part of her evaluation, which included a self-report computer test, physiological measures and ““clinician scored”” assessments that consider everything learned about the person being evaluated. This battery of tests provides multiple data points regarding psychological functioning, mental health history, symptom history, sexual interest, substance abuse, and sexual behaviors. Dr. Gottfried stated the tests she uses are the type other experts in her field reasonably rely on in rendering opinions, it is very important to have multiple data points as a basis for any opinion, and it would be unethical to base an opinion on one data point. (TT, pp. 212-215; R., pp. 208-211).

The self-report assessment results indicated Appellant presented a defensive style response about his own interest in sex and had a “really high level of denial related to past sexual interest or urges and things that might be considered deviant.” Appellant’s responses suggested Appellant tried to paint himself in an overly positive light with an unwillingness to disclose minor faults in himself. On one test, Appellant disclosed that from the age of 27-34, he engaged in child molestation three times with three different victims he identified as female neighbors or

acquaintances under the age of five and between the ages of six and thirteen. When Dr. Gottfried discussed the test results with Appellant, he agreed with the results, but noted he had a fourth victim (the four-year-old victim). (TT, pp. 215-217; R., pp. 211-213).

The test responses indicated Appellant placed responsibility for his conduct on having too much alcohol or drugs and his use of pornography. The tests also noted Appellant likely lacks sexual interests in adult women. Further Appellant indicated he knew it was wrong to engage in sexual activity with underage people, but attempted to explain away his conduct by indicating he was messed up, and then minimize his behavior by indicating he did not plan the actions and did not know how the sexual things happened. (TT, pp. 217-218, 224-225; R., pp. 213-214, 220-221).

After Judge Kelly affirmed his pre-trial ruling regarding the reliability and admissibility of the PPG test, Dr. Gottfried testified about the PPG test generally, research regarding the utility of the PPG test in psychosexual evaluations, and the protocols MUSC utilized for all PPG tests. (TT, pp. 221, 226-237; R., pp. 217, 222-233). As to Appellant's PPG test, Dr. Gottfried stated "his results were right in line with his offenses," "he had clinically significant sexual arousal to trials featuring sexual activity with a female infant, a preschool-aged female child, and a grammar school or elementary school-aged child," which "were really consistent with his offense behaviors." (TT, pp. 237-239; R., pp. 233-235).

Dr. Gottfried diagnosed Appellant with pedophilic disorder, exclusive type, sexually aroused to female prepubescent children, and explained the basis for her diagnosis. (TT, pp. 239-246; R., pp. 235-242). She then testified about actuarial risk assessments she completed, the Static-99R and the Static-2002R, and Appellant's scores on both assessments were in the average risk category when compared to other known sex offenders. She further testified the assessments are based only on known reoffenders and studies indicate only up to 30% of sex offenses are reported,

so the assessments potentially underestimate a particular individual's risk to reoffend. (TT, pp. 246-253; R., pp. 242-249).

Dr. Gottfried testified she found Appellant had multiple dynamic risk factors for sexually reoffending, including sexual deviation, sexual health problems, preoccupation with sex and pornography, relationship problems, chronic sexual offending, extreme minimization or denial of sex offending, and possible use of psychological coercion in his offenses (grooming behavior). She stated Appellant had not received any sex offender treatment even though it was offered to him while he was incarcerated, and the lack of treatment was significant because pedophilia is a chronic condition and if Appellant could control it, he would not have four victims. She further stated Appellant was able to control himself from committing other types of offenses, but repeatedly offended against prepubescent victims. (TT, pp. 253-259; R., pp. 249-255).

Dr. Gottfried testified Appellant had no realistic strategies to manage his condition in the future, and nothing indicated he was going to be able to stop himself from reoffending. The future plans Appellant discussed with Dr. Gottfried included living with his parents, working with a pastor on rehabilitation and spiritual growth, and using the pastor for accountability, counseling and support. Dr. Gottfried stated Appellant had family and community support while he was offending, so he had no new support system in place that might mitigate his risk. Her opinion to a reasonable degree of psychological certainty was Appellant had the mental abnormality of pedophilic disorder that made him likely to reoffend sexually if not confined for long term control, care and treatment. (TT, pp. 259-265; R., p. 255-261).

#### **DMH Evaluator**

Christopher Gillen, Psy.D, a DMH psychologist, was qualified as an expert in clinical forensic psychology, and testified DMH assigned him to conduct Appellant's initial evaluation.

He also diagnosed Appellant with pedophilic disorder based on his criminal offense history. In addition to reviewing records regarding Appellant's criminal history, Dr. Gillen reviewed records from Appellant's incarceration, and used the same actuarial risk assessment tools Dr. Gottfried used, which placed Appellant in the average risk category. While acknowledging Appellant had dynamic risk factors for reoffending, Dr. Gillen concluded the risk factors could be targeted in treatment and Appellant had a support system to help him, so he did not need to be confined for treatment of his pedophilic disorder. (TT, pp. 303-325; R., pp. 299-321).

On cross-examination, Dr. Gillen testified he found Appellant has at least four dynamic risk factors not accounted for by the actuarial risk assessment tools, which included sexual attraction to prepubescent children, lack of emotionally intimate relationships with adults, emotional congruence with children, and offense supportive attitudes. When Dr. Gillen interviewed him, Appellant denied his pedophilic interests "were an ongoing area of need - - or an ongoing area of concern for him," but Dr. Gillen testified pedophilic disorder is a chronic condition and he believed Appellant "will always be attracted to children for the rest of his life." Dr. Gillen ultimately concluded that despite Appellant's dynamic risk factors and history suggesting he has serious difficulty controlling his sexual deviance, Appellant did not meet the criteria for civil commitment under the SVPA. (TT, pp. 325-344; R., pp. 321-340).

In closing, the State argued Dr. Gottfried's evaluation was more thorough than Dr. Gillen's evaluation, and Dr. Gottfried had more information on which to base an informed decision. The State pointed out that both experts diagnosed Appellant with pedophilic disorder. Appellant also told both experts he did not currently have sexual interest in children, but the PPG test confirmed the diagnosis and showed Appellant did have ongoing sexual interests in children. The State then went over all Appellant's dynamic risk factors for reoffending that both experts identified, and the

additional risk factors Dr. Gottfried identified based on all the additional testing and information she gathered. (TT, pp. 360-376, 389-393; R., pp. 356-372, 385-389).

The jury found Appellant is a sexually violent predator beyond a reasonable doubt, and Judge Kelly ordered that he be committed to DMH custody for long term control, care and treatment. (TT, pp. 410-411, Order of Commitment filed March 16, 2022; R., pp. 406-407, 520).

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). “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).

Appellate courts review Rule 403 rulings pursuant to an abuse of discretion standard and give great deference to the trial court. Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197, 199 (2007). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should only be reversed in exceptional circumstances. Johnson v. Horry County Solid Waste Auth., 389 S.C. 528, 698 S.E.2d 835, 838 (Ct. App. 2010).

## ARGUMENT

**Judge Kelly did not abuse his discretion in admitting evidence regarding a penile plethysmograph performed by the State's expert which she used 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 interests.**

Appellant contends Judge Kelly erred in admitting Dr. Gottfried's testimony regarding the PPG test conducted as part of her comprehensive psychosexual evaluation of Appellant's mental status and risk to reoffend, asserting there was no evidence the PPG test is reliable, and its admission was more prejudicial than probative. As support, Appellant primarily relies on dicta from In re Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), while ignoring virtually undisputed evidence before Judge Kelly regarding the research and acceptance of the PPG test. He also presents an extremely truncated and misleading summation of Dr. Gottfried's testimony.<sup>1</sup>

In considering the admissibility of scientific evidence, the court looks at several factors, including: (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. 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. Council, 515 S.E.2d at 517-518.

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<sup>1</sup>Appellant repeatedly attempts to denigrate Dr. Gottfried's undisputed testimony by describing it as "vague" and "conclusory." These descriptions ignore the substance and context of her testimony in its entirety, which Judge Kelly clearly and properly did in reaching his decision. Dr. Gottfried's actual **extensive** pre-trial testimony is summarized above with direct citations to the testimony transcript.

### **A. PPG Testing Reliability**

In this case, Judge Kelly heard extensive testimony from Dr. Gottfried regarding PPG testing reliability, including current and on-going research, peer reviewed articles, and training on the operation of the PPG test system and interpretation of PPG test results.<sup>2</sup> Dr. Gottfried testified based on her first-hand training and experience, multiple research studies and publications regarding the reliability of the PPG test, the DSM-5 reference to the PPG test, and Dr. Gottfried's active participation in on-going national and international studies and scientific presentations regarding PPG testing in general and the RCV stimulus set in particular. She testified in depth regarding the SBCL protocols and quality control procedures used in every PPG test the lab conducts. She stated the PPG test research has been increasing, and a 2019 "best practices" book specifically about sexually violent predator evaluations includes a chapter discussing the utility of PPG testing in such evaluations.

Notwithstanding the Bilton dicta claiming near uniformity of other jurisdictions excluding the PPG test, courts have recognized the general acceptance and admissibility of the PPG test in sexually violent predator cases.<sup>3</sup> In In re Detention of Halgren, 156 Wash. 2d, 132 P.3d 714 (2006), the Washington Supreme Court found PPG test results were admissible as part of the diagnostic process, and the PPG test testimony would assist the jury in understanding the expert's

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<sup>2</sup>Appellant's assertion that "esoteric" and "junk science" "are both accurate descriptions of PPG testing" ignores all the legitimate scientific research Dr. Gottfried cited that support the reliability and utility of PPG testing, as well as approval of the PPG test as a legitimate medical test by government agencies and insurance companies (discussed below).

<sup>3</sup>This includes South Carolina circuit courts. See In re Care and Treatment of Gregg, 2018-CP-10-03472 (Jefferson, J.)(*rev'd* August 10, 2022; Petition for Writ of Certiorari filed December 7, 2022); In re Care and Treatment of Williford, 2019-CP-04-01380 (Sprouse, J.) (appeal pending).; In re Care and Treatment of Hyman, 2020-CP-21-1045 (Henderson, J.) (appeal pending).

sexual deviancy diagnosis.<sup>4</sup> *Id.* at 719. The court further found the issue of the PPG test's reliability goes to the weight of the evidence rather than its admissibility.<sup>5</sup> *Id.*; *see also* In re Detention of Herrick, 198 Wash. App. 439, 393 P.3d 879, 885 (2017) (PPG testing may provide critical information to an evaluator in determining if alleged sexual predator has a mental abnormality, and PPG testing is an effective and generally accepted method for evaluating sex offenders).

The Illinois appellate court also found PPG test 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 Sandry 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 (emphasis added). Acknowledging some experts have criticized and

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<sup>4</sup>Significantly, Washington's sexual predator statute expressly gives the courts the discretion to order the person to comply with a PPG test if requested by the evaluator. RCW §71.09.050(1). Thus, the Washington legislature recognized the PPG test is a valuable tool that should be available to evaluators if they believe it is necessary, and the Washington courts have found it to be reliable.

<sup>5</sup>The Bilton court dismissed Halgren as distinguishable because the Washington court found the PPG test was not novel and subject to the test for scientific evidence. This ignored the expressly stated reason for the Washington court's finding, which was that the PPG test had been analyzed in a previous case and found to be an effective method for assessing and treating sex offenders. 132 P.3d at 719.

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).

The Bilton court distinguished Sandry on the premise that “Illinois courts do not examine reliability before scientific evidence is admitted,” and did not even address all the case law and research articles discussed in Sandry. 432 S.E.2d at 446. As with its dismissal of Halgren, the court’s conclusion that Illinois courts do not examine reliability ignored a very significant part of the Sandry opinion, which analyzed Illinois case law expressly stating “[t]he determination of the reliability of an expert’s methodology is naturally subsumed by the inquiry into its general acceptance in the scientific community.” 857 N.E.2d at 308 (*quoting Donaldson v. Central Illinois Public Service Co.*, 767 N.E.2d 314 [2002])(emphasis added). Thus, in examining whether the PPG test is generally accepted in the scientific community, the Sandry court necessarily considered “reliability,” and its discussion of evidence indicating the PPG test is reliable and generally accepted is directly relevant here.<sup>6</sup>

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<sup>6</sup>The Bilton court also cited a concurring opinion in United States v. Weber, 451 F.3d 552 (9<sup>th</sup> Cir. 2006) for the proposition that the PPG test is “Orwellian when, **as here**, the State compels the subject to arouse himself sexually and then forces him to view deviant stimulants.” 851 S.E.2d at 444 (emphasis added). This statement is misleading. There was no evidence in Bilton, and there is no evidence in this case, that MUSC requires the person to “arouse himself sexually” before beginning the test. To the contrary, Dr. Gottfried expressly testified MUSC’s protocols do not include any masturbation requirement. (TT, p. 31; R., p. 27).

There is ample evidence the PPG test is widely researched and generally accepted. *See* Golde, J.A., et. al., Psychophysiological Assessment of Erectile Response and Its Suppression as a Function of Stimulus Media and Previous Experience with Plethysmography, *Journal of Sex Research*, 37(1), 53–59 (2000); Letourneau, E.J., A Comparison of Objective Measures of Sexual Arousal and Interest: Visual Reaction Time and Penile Plethysmography, *Sex Abuse* 14(3), 207-23 (July 2002); Kalmus, Beech, Forensic Assessment of Sexual Interest: A Review, *Aggression and Violent Behavior*. Vol. 10 Issue 2, pp. 193–217 (2005); Stinson, J.D., Becker, J.V., Assessing Sexual Deviance: A Comparison of Physiological, Historical, and Self-Report Measures. *J. Psychiatric Practice*, 14(6):379-88 (Nov. 2008); Howes, R.J., Measurement of Risk of Sexual Violence Through Phallometric Testing, *Leg Med (Tokyo)* 11 Suppl 1:S368-369 (April 2009); Marshall W. L., Phallometric Assessments of Sexual Interests: An Update, *Current Psychiatry Rep.* 16(1):428 (Jan. 2014); Burke, W. & Murphy L., International Collaboration: The Development of the Real Child Voices Stimulus Set, Keynote Address – International Academy of Sex Research Annual Meeting (July 2017); Plaud, J.J., The Use of Penile Plethysmography in SVP Assessment and Treatment Decision Making, *Sexually Violent Predators: A Clinical Science Handbook* 243-254 (O’Donohue & Bromberg (eds.) (2019); Gottfried, E., Use of Penile Plethysmography in Evaluations with Individuals Who Commit Sex Offenses, South Carolina Chapter of the Association for the Treatment of Sexual Abusers Annual Conference Presentation (March 2019); McPhail, I.V., et al., Validity in Phallometric Testing for Sexual Interests in Children: A Meta-Analytic Review, *Assessment* 26(3) 535-552 (2019); Murphy, L., Bradford, J. M., & Fedoroff, J. P., Laboratory Measurement of Penile Response in the Assessment of Sexual Interest, *Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues*, 159 (2021); Gottfried, E., et. al., Examining Relationships Between PPG Stimuli and a Visual Reaction Test

of Sexual Interest, 40<sup>th</sup> Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers Presentation (September 2021).

The PPG test “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.” Murphy, L., *et. al.*, Standardization of Penile Plethysmography in Assessment of Problematic Sexual Interests, J. Sex. Med. 12(9): 1853-1861 (2015); *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 test “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 test is “[p]erhaps the best means of objectively measuring deviant sexual interest”). While some controversy regarding PPG testing remains, as the Sandry court noted, the existence of contrary authority is not dispositive.<sup>7</sup>

In addition to numerous studies, articles and peer reviewed presentations indicating the PPG test is reliable and generally accepted, the PPG test has undergone Federal Drug Administration (FDA) review, and the FDA has approved several PPG systems, including the Limestone system used in this case.<sup>8</sup> In addition, the Medicaid/Medicare regulations provide

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<sup>7</sup>Indeed, DNA evidence has been widely accepted for years, but its admission is still challenged. *See State v. Phillips*, 430 S.C. 319, 844 S.E.2d 651 (2020) (evidence regarding “touch DNA” was inadmissible).

<sup>8</sup>*See* [https://www.accessdata.fda.gov/cdrh\\_docs/pdf5/K052929.pdf](https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf) (501(k) Summary – Limestone Technologies, Inc.)

coverage for PPG tests.<sup>9</sup> Major insurance companies, such as Blue Cross Blue Shield, also recognize the PPG test as a medical procedure, and either provide limited coverage or exclude it from coverage.<sup>10</sup> The federal government's and insurance companies' recognition of the PPG test as a valid medical procedure amply demonstrates its general acceptance in the health care community.

As Dr. Gottfried testified, further evidence of the PPG test's general acceptance in the mental health community is the reference to it in the DSM-5, which 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 plethysmography**, although sensitivity and specificity of diagnosis may vary from one site to another.

DSM-5-R 699 (emphasis added). While previous DSM versions did not recognize the PPG test at all, by the time the DSM-5 was published in 2013, there was sufficient research indicating the PPG test's validity as a tool to measure an individual's sexual interest.<sup>11</sup>

In psychosexual behavior evaluations, the PPG test provides data useful in 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-

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<sup>9</sup>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>).

<sup>10</sup>The PPG test is not just utilized in psychosexual evaluations and/or treatment, but used in general medical health care as well. 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>).

<sup>11</sup>Published in February 2022, the DSM-5-TR contains the same language on page 795, but adds that sites "frequently use different stimuli, procedures and scoring." As discussed above, however, the Limestone system used by MUSC has standardized protocols and procedures utilized in between fifty and one hundred labs across the country and internationally, and MUSC intentionally uses a cut score double the cut score recommended in the research literature to minimize the possibility of false positive results.

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* (emphasis added). *See also* Tong, Dean, 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.”)(emphasis added); Peters, James M., Assessment and Treatment of Sex Offenders: What Attorneys Need to Know, *Advocate*, 23 (Dec. 1999) (PPG test “is invaluable in the evaluation, treatment and management of known sexual offenders.”)(emphasis added).

Judge Kelly’s findings regarding the reliability of the PPG test and the admissibility of evidence regarding Appellant’s PPG test results are amply supported by the record. Dr. Gottfried considered the PPG test results as a single data point in a multi-faceted psychosexual evaluation, and without focusing on the PPG test, she testified about **all** the tests and information she considered in reaching her opinions regarding Appellant’s pedophilic disorder diagnosis and his risk to reoffend sexually if not confined for long term control, care and treatment.

## **B. Probative/Prejudice**

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “Although relevant, evidence may be excluded if its probative value is **substantially** outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE (emphasis added).

Appellant makes the conclusory argument that even if the PPG test evidence had probative value, it was outweighed by the danger of unfair prejudice to him. The PPG test results were no doubt prejudicial to Appellant, but they were consistent with his history of sexually offending against children, and Dr. Gottfried testified the PPG test was only one data point in her evaluation.

Appellant has a documented history of sexually offending against four prepubescent females. Results from psychological tests Dr. Gottfried administered as part of Appellant’s psychosexual evaluation indicated Appellant may try to present himself in a better light, and not be forthcoming about his sexual interests. Consistent with that indication, when Dr. Gottfried confronted Appellant about his reported offenses and his test results, he claimed his conduct was related to his use of Ambien, and he could not recall or refute the allegations.

The SVPA created a civil process for assessing potential sexually violent offenders. It is not punitive in nature but is intended “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.” In re Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118, 121 (Ct. App.2007) (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 Ettel, 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]).

In SVPA actions, the State is required to prove beyond a reasonable doubt the person presently suffers from a mental abnormality or personality disorder that makes him likely to engage in future acts of sexual violence if not confined for treatment. See In re Care and Treatment of Taft, 413 S.C. 16, 774 S.E.2d 462, 466 (2015) (the State must prove beyond a reasonable doubt that the person is presently a sexually violent predator). Considering the State’s significant burden of proof, any reliable test or assessment tool used by an expert in assessing the person’s mental status and risk to reoffend, including the PPG test, should be submitted for the jury’s consideration in accessing the expert’s methodology and ultimate opinions. An expert is always subject to cross-examination about any test or assessment on which the expert relied in forming relevant opinions.

In this case, both experts diagnosed Appellant with pedophilic disorder (deviant sexual interest in prepubescent children). In light of that undisputed diagnosis, the jury had to determine if Appellant had the propensity to offend sexually against children in the future if not confined for treatment.

In the face of Appellant’s contention he no longer had sexual interest in children, the PPG test results indicated Appellant’s well-established history of sexual arousal to prepubescent children continued, which was highly relevant to the jury’s determination of whether Appellant was presently likely to offend sexually against children in the future if not confined for treatment for his pedophilic disorder. Dr. Gottfried testified about all the data she considered in her evaluation, which included Appellant’s history of offending against prepubescent children,

information from the psychological tests she administered, the PPG test results, and information gathered during Appellant's interview.

The State briefly referenced the PPG test during closing argument as only one data point in Appellant's comprehensive psychosexual evaluation that confirmed Dr. Gottfried's diagnosis and risk assessment. Instead, the State focused on the thoroughness of Dr. Gottfried's evaluation as opposed to the DMH evaluator's evaluation.

When viewed in light of the issues before the jury and the entire record, the prejudice to Appellant arising from the PPG test evidence did not substantially outweigh the evidence's probative value. The evidence presented amply supports Judge Kelly's findings regarding the PPG test as well as the jury's verdict that Appellant is a sexually violent predator as defined by the SVPA, and the verdict should be affirmed.

**CONCLUSION**

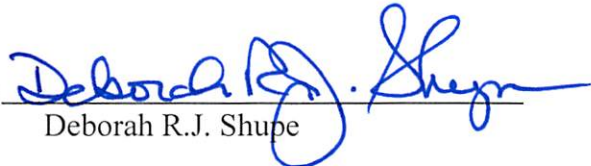
Based on the foregoing, the State respectfully submits Appellant's civil commitment pursuant to the SVPA should be affirmed.

Respectfully submitted,

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April 4, 2023

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**SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
The Honorable R. Keith Kelly, Circuit Court Judge  
Appellate Case No. 2022-000371

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IN THE MATTER OF THE CARE AND TREATMENT  
OF SHAWN TORLIF DAILY,

APPELLANT

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**CERTIFICATE OF CONNSEL**

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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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April 3, 2023