

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County
The Honorable Deadra A. Jefferson, Circuit Court Judge
Court of Appeals Appellate Case No. 2019-001945
On Certiorari to the Court of Appeals
Supreme Court Appellate Case No. 2022-001710

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

RESPONDENT.

REPLY BRIEF OF PETITIONER

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ARGUMENT

The issue before Judge Jefferson and the court of appeals was the scientific reliability of the PPG test methodology and admissibility of the PPG evidence as part of the basis for Dr. Gottfried's forensic psychosexual evaluation conclusions and opinions in this SVPA proceeding.

Respondent begins his Brief with the faulty premise that the court of appeals ruled narrowly on the issue of whether “the stimulus set [presumably the Real Child Voices (RCV) stimulus set] administered to Respondent was reliable and admissible,” rather than whether the underlying science of PPG testing evidence is reliable and admissible in SVPA cases. Respondent's attempted distraction via this faulty premise is unavailing. A cursory review of the circuit court and court of appeals records, as well as the court of appeals' unpublished opinion itself, clearly reveals the reliability and admissibility of PPG testing evidence as part of the basis for an expert's opinions in SVPA cases was the exact issue raised before, and ruled on by, Judge Jefferson, and subsequently considered by the court of appeals.

In addressing the issue before her, Judge Jefferson stated “[t]he respondent's whole argument rests on the admissibility of the science, that being the reliability of the science,” “[w]hat is being questioned is the underlying science and whether it is reliable,” and “[t]he respondent contends the underlying science of the PPG testing is unreliable.” (R., p. 214) (emphasis added). The State seeks a ruling from the Court that under the appropriate standard of review, Judge Jefferson did not abuse her discretion in finding the underlying science of PPG testing is reliable and admissible under Jones/Council, as well as a definitive ruling regarding the admissibility of PPG test evidence in SVPA cases.¹

¹Respondent's attempt to limit this Court's focus to the RCV stimulus set is telling and does not make his position any stronger because even his argument on that single component of PPG testing is demonstrably wrong. Respondent's Brief is replete with misrepresentations

PPG History and Case Law

Respondent's references to the historical development and uses of the PPG test are irrelevant to the issue before this Court. His truncated recitation of PPG test history ignores the years of research and improvements to the PPG test methodology undertaken since the 1950s and is intended to prejudice this Court against the modern PPG test itself. In essence, Respondent seeks to perpetuate the misconception that the PPG test is "junk science."

Indeed, the law review article Respondent cites as authority begins with the author's clear bias against PPG testing, and the article includes some sweeping propositions stated as fact rather than opinion, which Respondent quotes in his Brief. The devil is truly in the details of the article and its 295 footnotes. For instance, in footnote 1, the author acknowledges assistance from "a great many people, a large number of whom would likely reject the article's conclusions." (emphasis added). Odeshoo, Jason T., Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol & Civ. Rights L.Rev., n. 1 (Fall 2004). Thus, the author's conclusions are immediately suspect, especially since nothing in the article or footnotes indicates the author has any background or education in psychology or science, and an internet search reveals his undergraduate and masters degrees are in philosophy.

Respondent then cites case law predating the extensive research regarding the reliability and validity of PPG testing as it has been further developed and improved. To the extent those cases involved imposition of a PPG test condition as part of a criminal sentence, the analysis relates to potential criminal incarceration based on a PPG test result, which is irrelevant to SVPA proceedings. Further, none of the cited cases involved the type of extensive foundational evidence

regarding the evidence presented in this case, and the State craves reference to the actual testimony and arguments before Judge Jefferson and the court of appeals. See Brief of Petitioner, Statement of Facts, pp. 4-13, for citations to the record.

presented to Judge Jefferson in this case. *See, e.g., United States v. McLaurin*, 731 F.3d 258 (2nd Cir. 2013) (vacating supervised release condition of PPG testing; absence of sufficient evidence regarding PPG test reliability for the intended purpose);² *United States v. Medina*, 779 F.3d 55 (1st Cir. 2015) (no evidence in the record to support forced submission to PPG testing as a condition of sentence; district courts must provide substantial justification in order for the requirement to be deemed facially reasonable); *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006) (PPG testing requirement imposed as part of criminal sentence treatment condition vacated due to lack of necessary evidentiary record, justification and findings; case remanded for further proceedings consistent with opinion); *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995) (district court's exclusion of PPG test evidence was not abuse of discretion "in light of extensive, unanswered evidence weighing against the scientific validity of the [PPG]."³

As part of his contention the only issue before the circuit court and the court of appeals was the reliability of the RCV stimulus set, Respondent asserts the State is attempting "to piggyback the reliability of the software/stimulus set on top of the reliability of the hardware." (Brief of Respondent, p. 6). As a threshold matter, the fallacy of this assertion is obvious because

²In *McLaurin*, the district court imposed the PPG testing condition in the face of its own specific finding the defendant "was unlikely to reoffend." *Id.* at 262-263. In this case, however, whether Respondent is "likely to reoffend" was directly at issue. Ample research indicates sexual deviance is one of the strongest predictors of sexual recidivism, and the approaches used to assess sexual deviance include self-reports, "phallometric assessments," offense history and structural clinical ratings. Hanson and Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. Consult. Clin. Psychol. No. 6, 1154-1163 (2005). Dr. Gottfried uses all of these approaches in her forensic psychosexual evaluations.

³Respondent also cites Kaye, *et. al.*, *The New Wigmore: Expert Evidence*, §8.8.2, n. 21 (2010), for the proposition that courts have generally excluded PPG evidence. Published in 2010, the book does not discuss current and ongoing research, and while the body of the cited portion does make the broad assertion of general exclusion, the cases cited in the referenced footnote are **not** uniform in excluding the PPG test evidence as unreliable. Much "unanswered evidence" regarding the scientific validity of the PPG test has been answered through years of research and improvements to the PPG test system.

the PPG test hardware and software are all part of a testing system, and the hardware cannot operate without the software, including the stimulus sets. Further, the Limestone 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.⁴

Respondent does not even attempt to argue against the extensive evidence establishing that the PPG test methodology has been studied and found to be reliable in numerous “peer-reviewed” published articles, or present authoritative articles to the contrary for this Court’s consideration.⁵

⁴It is important to note the PPG test is not used solely for sexual predator evaluations. As indicated by the involvement of the FDA and insurance companies, it is used in diagnosing and treating general sexual health issues in men, such as erectile dysfunction.

⁵As Judge Jefferson found, Dr. Gehle’s entire testimony regarding the PPG was premised on “periodicals” she read, but Respondent only cites a 2004 article and a 2010 book footnote in his Brief (discussed above). In addition to the articles cited in the Brief of Petitioner, the following articles discuss the efficacy of PPG testing: Bailey, J. & Greenburg, A., The Science and Ethics of Castration: Lessons from the Morse Case, 92 N.W.U. L.Rev, 1225, 1226 (1998) (paraphilias can often be assessed via PPG); Becker, J. & Murphy, W., What We Know and Do Not Know About Assessing and Treating Sex Offenders, 4 Psychol. Pub. Pol’y & L. 116, 125 (1998) (two factors, deviant sexual arousal, as measured by penile plethysmography, and psychopathy, as measured by the Psychopathy Checklist (Hare, 1970), have been strong predictors of recidivism in sex offenders); Carter, M., *et al.*, Promoting Offender Accountability and Community Safety through the Comprehensive Approach to Sex Offender Management, 34 Seton Hall L.Rev. 1273, 1285 (2004) (psychosexual assessments may incorporate the use of PPG testing to assess objectively the presence of deviant sexual arousal, preference, and interest); Doren, D., Evaluating Sex Offenders: A Manual for Civil Commitment and Beyond at 46 (2002) (PPG testing has potential utility in both diagnostic and risk assessment portions of an evaluation, and there is significant reason to believe deviant PPG results are meaningful to assessing risk for sexual recidivism); Hamill, R., Recidivism of Sex Offenders: What You Need to Know, 15 Criminal Justice 24, 29 (ABA 2001) (1996 and 1998 studies PPG test result showing preference for children had strongest predictive value among 21 factors for predicting sexual recidivism); Harris, G., *et al.*, The Science in Phallometric Measurement of Male Sexual Interest, 5 Current Directions in Psychological Science 156-160, 159 (1996) (PPG is the best available scientific measure of men’s sexual preferences); Janus, E & Prentky, R., Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability, 40 Am. Crim. L.Rev. 1443, 1468 (2003) (“In their combined sample, they found support for the predictive validity of ratings on the Psychopathy Checklist, penile plethysmographic assessment, and prior criminal history”); Langevin, R. & Watson, R.J., Major Factors in the Assessment of Paraphilics and Sex Offenders,

Nor does Respondent argue against the case law finding PPG test evidence was reliable and admissible as evidence, apparently in the hope this Court will ignore it just as the court of appeals ignored it.⁶

in Sex Offender Treatment: Biological Dysfunction, Intrapsychic Conflict, Interpersonal Violence 42 (1996) (“plethysmography is one of the most reliable and valid physiological measures available. . . . [and is] in a league of its own.”); Mee, C. & Hall, H., Risky Business: Assessing Dangerousness in Hawaii, 24 U. Haw. L.Rev. 63, 105 n. 227 (2001) (“Yet research findings show that the plethysmograph is the single best predictor of sexual violence”); Pithers, W. & Laws, D., Phallometric Assessment in The Sex Offender: Collections. Treatment and Legal Practice, 1, 2-2(1995) (“Phallometry is an essential technology in the assessment and treatment of the sexual aggressor. . . . [A]ny restrictions imposed on a specially trained clinician’s ability to employ phallometry in assessing and treating sex offenders would be analogous to depriving a physician the right to obtain x-rays in cases of bone injuries.” [internal citation omitted]); Schopp, R., *et al.*, Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator after Hendricks, 5 Psychology, Public Policy & Law 120, 135 (1999) (“Deviant sexual preferences, as measured through plethysmographic assessment, increase the probability of recidivism.”); Wettstein, R., A Psychiatric Perspective on Washington’s Sexually Violent Predator Statute, 15 U. Puget Sound L.Rev. 597, 610 (1992) (recommending plethysmography as part of the evaluation of sex offenders); Woodworth, G. & Kadane, J., Expert Testimony Supporting Post-Sentence Civil Incarceration of Violent Sexual Offenders, 3 Law, Probability, & Risk 211, 229 (2004) (“The single best predictor [of risk] was phallometric assessment of deviant sexual preference.”).

⁶ In addition to the cases cited in the Brief of Petitioner, see In re Detention of Brennan, 190 Wash.App 1028, 2015 WL 6441717 (Wash. App. Dist. 2, 2015) (criticisms of PPG testing do not establish it is no longer accepted or authorized, but go to the weight of the evidence, which is reserved for the fact finder); In re Commitment of Jeff C. Rivers-Finney, Case No. 13-CA-2970-16-A, Order Permitting Defendant to Present Penile Plethysmography Evidence But Excluding Polygraph Evidence from Trial (8th Judicial Cir., Seminole County FL, December 16, 2015) (finding underlying principals and methods of the PPG test are scientifically reliable under both Frye and Daubert standards).

The testimony at the pre-trial hearing established there is disagreement about PPG testing and Judge Jefferson was well aware of that fact. Rather than address the evidence before Judge Jefferson or the cases and numerous research articles cited by the State, however, Respondent erroneously describes the record and testimony throughout his Brief, and resorts to gross simplification of how the PPG test system works.

Reliability

Respondent's continued assertion that the court of appeals "properly" focused on the reliability of the RCV stimulus set rather than the PPG testing methodology in general is belied by the court of appeals' opinion itself. The specific findings requiring peer review and/or findings of reliability for the "Limestone certification standards" and "MUSC's PPG procedures" could only be relevant to the general reliability of the PPG testing methodology, not the RCV stimulus set specifically.

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 were submitted for presentations at scientific conferences, peer reviewed, and approved for presentation purposes.⁷ (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.

⁷As discussed in the Brief of Petitioner, there are multiple avenues for a scientific test to be "peer reviewed," and the lack of "publication" in a peer reviewed journal is not dispositive in analyzing the reliability of a scientific methodology. (Brief of Petitioner, pp. 25-26).

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, making only a vague reference to “another stimuli set used during appellant’s (sic) test.” (Brief of Respondent, p. 9). By failing to even name the Marshall stimulus set, Respondent attempts to avoid the court of appeals’ complete failure to acknowledge it, while ignoring the undisputed evidence that 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.⁸ (R., pp. 111, 216, 330). Respondent asks this Court to do the same thing the court of appeals did – completely ignore that undisputed evidence.

Compounding his distraction strategy, and in a thinly veiled attempt to prejudice this Court, Respondent makes the patently unsupported assertion Dr. Gottfried’s lab “created and sells the stimulus set given to Respondent,” thereby implying MUSC has some financial incentive to use the RCV stimulus set, which then somehow leads to the conclusion that the RCV stimulus set is unreliable.⁹ (Brief of Respondent, p. 12). The portion of the Record on Appeal Respondent cites does not even arguably support his assertion. Indeed, there is absolutely **no** evidence, and none exists, that MUSC “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

⁸Respondent’s assertion Dr. Gottfried “did not know” whether the Marshall stimulus set had been connected with coercive paraphilic disorder in peer reviewed research is very misleading. Dr. Gottfried testified there are “a number of PPG studies looking at adult rapists” indicating the PPG test can show people who are aroused to rape, and she could not state the stimulus sets used in those studies were the Marshall sets, but the Marshall set had been around for a long time and some of the methods described in the studies sounded “very much like the Marshall.” (R., p. 330).

⁹Respondent made the same statement in his Return to the Petition for Writ of Certiorari, which was directly refuted in the Reply to the Return, and Respondent cites no new support for it now.

well-established Limestone system for its lab and received the RCV stimulus set like every other purchaser. (R., p. 331).

Respondent repeatedly takes snippets of testimony and argument before Judge Jefferson out of context in order to support his conclusory assertions that Judge Jefferson erred in admitting the PPG test evidence. Such artificial isolation leads to misapprehension of the actual evidence and argument.

By way of example, contrary to Respondent's assertion the PPG test results were "one of the main bases" for Dr. Gottfried's diagnosis of paraphilic coercive disorder, Dr. Gottfried specifically testified her paraphilic disorder diagnosis and risk assessment evaluation were not premised on the PPG test results alone. Rather, 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, and the PPG test results were consistent with the arousal pattern established by Respondent's sexual offenses. (R., pp. 100-101, 114, 340-341, 386). The fact Dr. Gottfried honestly testified she could not quantify in hindsight exactly how much weight she gave the results does not render the results a "primary" basis for her opinions in light of her testimony regarding everything she considered for evaluation purposes.

Respondent then misrepresents a statement the State made during pre-trial arguments as an admission that the RCV stimulus set had never been subjected to peer review. (Brief of Respondent, p. 10). Significantly, just prior to the statement Respondent quotes, the State expressly argued that the "main issue" was whether "the underlying science" is 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 entirety of the State's argument to

Judge Jefferson undermines Respondent's contention that the issue of reliability and admissibility of the science underlying PPG test evidence in general was not litigated before Judge Jefferson because the State's argument makes it clear that was exactly the issue presented to and ruled on by Judge Jefferson.¹⁰ As discussed above, Judge Jefferson clearly recognized the reliability of the underlying science of PPG testing in general was the issue before her.

Respondent likens the PPG test to polygraphs and states as fact the totally unsupported claim that a PPG test is "simply a more specific type of polygraph." (Brief of Respondent, p. 11). Taking portions of Dr. Gottfried's testimony out of context, Respondent asserts she stated the polygraph was used to establish control groups (which can exist) to verify PPG test results.¹¹ He then broadly asserts that since polygraph evidence is unreliable and inadmissible, it necessarily follows that PPG test evidence cannot be admissible because "human arousal is a far more complicated thing to attempt to measure and understand than deception."¹² Respondent then reduces the MUSC lab's extensive quality control requirements to mere "countermeasures" like those of a polygraph, when the actual evidence reveals MUSC's quality control procedures involve

¹⁰The State was referencing the lack of published peer review articles regarding the RCV stimulus set rather than admitting there was no peer review of it at all, particularly in light of the evidence presented expressly indicating the stimulus set had been peer reviewed and accepted by way of abstracts for presentations at multiple scientific conferences.

¹¹Control groups are an inherent part of virtually any scientific study, and Dr. Gottfried ably described the control group methodology used for PPG test studies. The use of polygraphs as one part of a control group methodology does not inevitably lead to the conclusion the testing method at issue must itself be unreliable.

¹²This broad statement appears to be based on the single 2004 law review article (discussed above) and Dr. Gehle's testimony that she does not use the PPG test because human arousal is poorly understood. The fact that something may be poorly understood by some people does not lead to the conclusion that a well-researched and generally accepted method to measure it is unreliable. Conditions leading to tornadoes were poorly understood for many years, but scientists were able to measure them and can now predict tornadoes with a high level of accuracy.

much more than simply subjectively measuring respiration and movement as in a polygraph. (R., pp. 109-110).

In an obvious exercise of inflammatory rhetoric designed to distract from the evidence and issue in this case, Respondent claims that “[i]f this Court chooses to give the State *carte blanche* to admit PPG tests, it will have to reconsider at some point its precedents banning admissibility of polygraph testing.” (Brief of Respondent, p. 11). This case **only** involves the reliability and admissibility of PPG test evidence specifically in SVPA cases, in which the person’s mental status and propensity to commit future acts of sexual violence are the primary issues for determination, and **only** if an expert evaluator deems it necessary to perform PPG testing as part of an evaluation to address those issues in the SVPA context.

The record in this case presents extensive competing testimony from two experts regarding the reliability of the science underlying the 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.¹³ 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 she made detailed findings and conclusions regarding each Jones/Council factor. (R., pp. 179, 212-219).

¹³With competing expert testimony, part of Judge Jefferson’s analysis necessarily went to the credibility of the two expert witnesses, and she determined, with ample support in the evidence, that Dr. Gottfried was more credible on the PPG issue than Dr. Gehle. Respondent’s contention Judge Jefferson’s credibility determination was “problematic and illogical” is itself problematic and illogical, and his phrenologist/neurologist comparison is nonsense. (Brief of Respondent, p. 9 n. 1). Dr. Gottfried had substantial first-hand experience with administering, interpreting, and researching PPG testing. In comparison, Dr. Gehle simply read articles (not identified) and did no independent investigation into PPG testing. (R., pp. 91-95, 218).

Respondent initially acknowledges the abuse of discretion standard of review, but like the court of appeals, fails to identify exactly which of Judge Jefferson's factual findings were unsupported by the evidence, or any error of law in her findings and conclusions. He avoids analyzing the standard of review by focusing solely on the RCV stimulus set, which was not the issue before Judge Jefferson, ignoring the RCV stimulus set evidence that was before Judge Jefferson and glossing over the Marshall set evidence.

Respondent's failure to legitimately address the evidence before Judge Jefferson is amply demonstrated by the extraordinarily limited citations to the record in his Brief. After resorting to contextually inaccurate claims regarding the evidence, Respondent summarily concludes the State failed to establish the reliability of the RCV stimulus set, Judge Jefferson erred in admitting the PPG evidence, the error was not harmless, and the court of appeal properly reversed Judge Jefferson's ruling and the jury verdict finding Respondent is a sexually violent predator. He then asks this Court to do the same.

Judge Jefferson properly performed her gatekeeper role by carefully considering the evidence and arguments presented to her, and making well supported findings and conclusions regarding the reliability and admissibility of the PPG test evidence as part of the basis for Dr. Gottfried's conclusions and opinions. As set forth in the Brief of Petitioner, rather than applying the appropriate abuse of discretion standard of review, the court of appeals ignored evidence and substituted its judgment for Judge Jefferson's well-reasoned ruling. Accordingly, the court of appeals opinion should be reversed and the jury verdict finding Respondent is a sexually violent predator as defined by the SVPA should be affirmed.

CONCLUSION

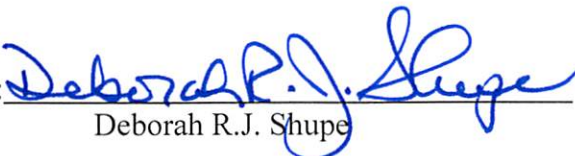
Based on the foregoing, the Brief of Petitioner and the record, the State respectfully submits the court of appeals decision should be reversed, Judge Jefferson's findings and conclusions regarding the admissibility of the PPG testimony were amply supported by the evidence and should be affirmed, and the well-supported jury verdict finding Respondent is a sexually violent predator and committing him for long term control, care and treatment pursuant to the SVPA should be affirmed.

Respectfully submitted,

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