

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Charleston County
Honorable Deadra L. 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

THE STATE,

Petitioner,

vs.

RONALD MJ GREGG,

Respondent.

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

In the Matter of the Care and Treatment of Ronald MJ
Gregg, Appellant.

Appellate Case No. 2019-001954

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2022-UP-336
Submitted July 27, 2022 – Filed August 10, 2022

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Deborah R.J. Shupe,
both of Columbia, for Respondent.

PER CURIAM: Ronald MJ Gregg appeals his commitment to the Department of Mental Health pursuant to the Sexually Violent Predator Act.¹ On appeal, Gregg challenges the circuit court's finding that the State's expert could testify about the results of his penile plethysmography (PPG). He argues the PPG he underwent

¹ S.C. Code Ann. §§ 44-48-10 to -170 (2018).

was unreliable. We agree and accordingly reverse and remand pursuant to Rule 220(b), SCACR.

We hold the circuit court abused its discretion in finding the PPG testimony was admissible. There was no evidence the Limestone certification standards had been subjected to peer review and/or found reliable. There was also no evidence MUSC's PPG procedures had been subjected to peer review and/or found reliable. Finally, there was no evidence the Real Child Voices stimulus set had been subjected to peer review and/or found reliable. *See State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009) ("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."); *In re Gonzalez*, 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000))); *In re Bilton*, 432 S.C. 157, 166, 851 S.E.2d 442, 446 (Ct. App. 2020) ("Reliability is one of the three things a South Carolina court *must* assess before an expert's testimony is admitted."); *Watson v. Ford Motor Co.*, 389 S.C. 434, 450, 699 S.E.2d 169, 177 (2010) ("[F]actors that the trial court should consider when determining . . . reliab[ility] are]: '(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.'" (footnote omitted) (quoting *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999))); *Bilton*, 432 S.C. at 162, 851 S.E.2d at 444 ("The [PPG] test is controversial and has been criticized for a lack of standardization and for being subject to manipulation."); *id.* at 162-63, 851 S.E.2d at 444 ("[W]ith limited exceptions . . . courts have 'uniformly' declared that PPG test results are 'inadmissible as evidence because there are no accepted standards for this test in the scientific community.'" (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000))).

Moreover, we hold admitting the testimony about Gregg's PPG test results was not harmless error because the testimony was before a jury, it was extensive, the State's expert called the PPG an "objective" way of determining what sexually arouses a male, and the State emphasized the PPG in its closing, stating "his body can't lie." *See Gonzalez*, 409 S.C. at 636, 763 S.E.2d at 217 ("A fundamental principle of appellate procedure is that a challenged decision must be both erroneous and prejudicial to warrant reversal."); *id.* ("Error is harmless where it could not have

reasonably affected the result of the trial." (quoting *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009)); *Bilton*, 432 S.C. at 164, 851 S.E.2d at 445 ("Some jurisdictions have held that an expert may rely on a PPG as a basis for the expert's opinion but have expressly declined to consider whether the test results should be disclosed to the jury given the special weight the jury is likely to afford things that have the appearance of scientific evidence."); *id.* at 168, 851 S.E.2d at 447 ("[W]e cannot fairly say that beyond a reasonable doubt, the PPG test results did not contribute to the jury's verdict[because they] were presented as empirical proof that [the appellant] had deviant sexual attractions and as a material factor for the jury to consider.").

REVERSED AND REMANDED.²

THOMAS, MCDONALD, and HEWITT, JJ., concur.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Deadra A. Jefferson, Circuit Court Judge
Appellate Case No. 2019-001945

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

APPELLANT

**RESPONDENT'S PETITION FOR REHEARING
AND PETITION FOR REHEARING *EN BANC***

Rehearing and rehearing *en banc* is appropriate and necessary in this case because the panel overlooked facts in the record, and misapprehended the law related to admissibility of expert opinions and the appropriate standard of review on appeal. In particular, consistent with the Supreme Court's standards as set forth in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the State presented sufficient evidence of the PPG's reliability and admissibility as it related to the expert's opinion on the question of whether Appellant is a sexually violent predator under South Carolina law. The panel's apparently *de novo* determination regarding reliability and admissibility was based on specific factual and legal concerns neither challenged before the circuit court below, nor argued in the parties' briefs before this court. In addition, the panel failed to recognize and give due deference to the findings and legal conclusions of the Honorable Deadra L. Jefferson after a full evidentiary hearing. Rehearing

and rehearing *en banc* will allow the parties to address, for the first time, the new concerns raised in the unpublished panel opinion.

Further, the panel decided this case without oral argument, during which evidence regarding the PPG's general reliability and acceptance could have been discussed, and the State would have been afforded an opportunity to address the panel's concerns. Therefore, the State moves for rehearing *en banc* and oral argument so the State will have a full opportunity to be heard on the particular issues set forth below.

A. The panel misconstrued the peer review issue and overlooked evidence supporting admissibility of the PPG testimony.

In finding "no evidence" regarding the three delineated items set forth in the opinion, the panel misconstrued the factors regarding reliability and admissibility set forth in Jones/Council, and overlooked significant evidence in the record that Judge Jefferson expressly cited in support of her findings and ultimate conclusion the PPG was reliable and admissible. Rather than focus on the Jones/Council factors and the evidence Judge Jefferson considered, the panel relied on minutia regarding "peer review" and/or reliability of the "Limestone certification standards" and "MUSC's PPG procedures," issues that were not challenged at trial or addressed in either party's brief. The panel then completely overlooked substantial evidence regarding peer review and reliability of the Real Child Voices stimulus set. Indeed, it is difficult to find any indication the panel actually considered Judge Jefferson's detailed ruling because there is no reference to it in the opinion. (See standard of review discussion below).

1. Reliability of the Limestone certification standards was not challenged at trial, and such evidence is not required to establish admissibility in the absence of a specific objection.

Contrary to the demands suggested by the panel opinion's result, whether or not the Limestone certification standards were subjected to either peer review or found to be reliable was not raised as an objection or deficiency to admission of the PPG evidence at trial, or in the briefs before this court, as a basis to exclude the PPG testimony. In spite of that fact, the panel found Judge Jefferson erred in admitting the PPG evidence because "[t]here was no evidence the Limestone certification standards had been subjected to peer review and/or found reliable."

As part of her testimony regarding quality control in the MUSC lab, the State's expert, Dr. Emily Gottfried, indicated Limestone's "certification process" is the training Limestone provides to labs and/or individuals using the Limestone PPG hardware and software. Thus, a "certification" indicates the lab and/or individuals have completed the training and are qualified to operate and use the system as Limestone intended. (R., pp. 109-110). See Jones, 541 S.E.2d at 819 (quality control and peer review are separate and distinct factors for consideration).

In spite of diligent searching, the State can find no case law in South Carolina or elsewhere indicating that admissibility of evidence regarding a particular scientific test or technique requires evidence the training provided to use the testing equipment and interpret the results must be either peer reviewed or found to be reliable. Indeed, the Jones/Council analysis goes to the reliability of the test or technique itself, not the training to operate the testing machines or interpret the test results. The panel conflated peer review and quality control, which are separate and distinct factors.

2. Reliability of MUSC's PPG procedures was not challenged at trial, and the panel overlooked evidence indicating the MUSC procedures were consistent and reliable.

Also, contrary to the demands suggested by the panel opinion's result, whether or not the MUSC PPG procedures were subjected to either peer review or found to be reliable was not raised as an objection or deficiency to admission of the PPG evidence at trial, or in the briefs before this court, as a basis to exclude the PPG testimony. In spite of that fact, the panel found "[t]here was also no evidence MUSC's PPG procedures had been subjected to peer review and/or found reliable."

As with the panel's Limestone certification standards finding, in spite of diligent searching, the State can find no case law in South Carolina or elsewhere indicating admissibility of evidence regarding a particular scientific test or technique requires evidence that the procedures in an individual lab using the test or technique must be peer reviewed and/or found to be reliable. Requiring such evidence would require every lab performing any scientific test to have its internal procedures peer reviewed and found to be reliable in order to have the test results admissible as evidence. That is not, and never has been, the law, and the panel again conflated the Jones/Council peer review and quality control factors.

Even if reliability of the individual lab procedures is required, which the State disputes, the panel overlooked ample evidence before Judge Jefferson establishing the reliability of MUSC's procedures in this case. Again, as part of her quality control testimony, Dr. Gottfried testified extensively about how each PPG is performed in the MUSC lab and the quality control measures MUSC utilizes for every test. All MUSC lab personnel involved in administration of PPG tests are trained by Limestone, and each PPG test performed in the MUSC lab is performed in exactly the same way according to a checklist provided by Limestone. The strain gauge is calibrated

multiple times using the same method, and the software will not even allow a test to begin until the gauge is properly calibrated. There are sound checks to ensure all the sound equipment is working properly, and the humidity and temperature inside the lab is controlled. In addition, as a safeguard against false positives, MUSC uses a higher cut score for significant arousals than recommended in the published literature. (R., pp. 99-110).

Further, as discussed in the Brief of Respondent, the Limestone system is approved by the Federal Drug Administration and utilized in numerous labs in the United States, and the PPG has been recognized as a valid medical procedure by Medicare/Medicaid and Blue Cross/Blue Shield.

The PPG has undergone Federal Drug Administration review, and the FDA has approved several PPG systems, including the Limestone system used in this case. See 501(k) Summary – Limestone Technologies, Inc. (https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf). In addition, the Medicaid/Medicare regulations provide coverage for PPG tests. See Federal Register Volume 72, Number 61, Addendum III and Addendum V (Friday, March 30, 2007) (<https://www.gpo.gov/fdsys/pkg/FR-2007-03-30/html/07-1414.htm>). Major insurance companies, such as Blue Cross Blue Shield, also recognize the PPG as a medical procedure, and either provide limited coverage, or exclude it from coverage. See Blue Cross Blue Shield of Texas, Treatment of Male Sexual Dysfunction, Special Comment on Contract Exclusions (January 7, 2003) (<https://www.bcbstx.com/provider/pdf/medicalpolicies/surgery/717-010.pdf>). The Federal Government's and insurance companies' recognition of the PPG as a valid medical device and procedure amply demonstrates its general acceptance.

(Brief of Respondent, p. 24). In short, the PPG system MUSC uses has been approved as a valid medical test after vigorous review by government agencies and private companies, and since MUSC uses the operating procedures promulgated by the system's manufacturer, the evidence establishes MUSC's PPG procedures are consistent and reliable.

3. The panel overlooked evidence that the Real Child Voices stimulus set has been peer reviewed, and MUSC also used the extensively peer reviewed Marshall stimulus set in Appellant's PPG test.

Contrary to the panel opinion's finding there was "no evidence" the Real Child Voices stimulus set has been either peer reviewed or found to be reliable, as discussed in the Brief of

Respondent and below, the Real Child Voices stimulus set was peer reviewed multiple times between 2015-2019, is the subject of on-going research projects, and has been found to be more accurate than other stimulus sets. (Brief of Respondent, p. 8; R., pp. 119-121, 134-138, 328-331, 334-337). In light of that evidence, the panel's finding is inaccurate.

The panel overlooked Dr. Gottfried's testimony regarding the peer reviewed abstracts for at least five scientific conference presentations about the Real Child Voices stimulus set, which specifically addressed studies of PPG data from MUSC and PPG labs in Canada and other countries, and found the Real Child Voices set was more accurate than other stimulus sets. (R., pp. 134-138, 328-331). She acknowledged there were no peer reviewed published articles regarding the Real Child Voices stimulus set, but testified she was actively involved in a collaborative effort with other PPG labs to prepare an article for submission, peer review and publication regarding the data and conclusions from their use of the Real Child Voices stimulus set. She also testified the preliminary data showed a higher degree of accuracy than the Marshall set. (R., pp. 119-121, 136-137).

The panel appeared to focus on "peer review" as a prerequisite for finding a particular scientific test or technique is reliable. While peer review and publication is one factor to be considered under Jones/Council, it is not the determinative factor. Expert testimony may be reliable and admissible without peer review and publication. In re Viagra, 424 F.Supp.3d 781, 791 (N.D. Cal. 2020) (*citing Wendell v. GlaxoSmithKline, LLC*, 858 F.3d 1227, 1237 [9th Cir. 2017]). The absence of independent research into a topic at issue does not mean the experts' methods were unreliable. *Id.*; *see also United States v. Cloud*, 576 F.Supp.3d 827, 841 (E.D. Wash. 2021) (existence of peer reviewed literature can help determine methodology's reliability, but "the 'fact

of publication (or lack thereof) in a peer reviewed journal' is not dispositive") (*quoting Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 [1993]).¹

Even assuming "peer review" of the Real Child Voices stimulus set is required, however, Dr. Gottfried testified the stimulus set has been peer reviewed. There are different types of accepted peer review, including a "presentation of a study at a scientific conference or symposium, where it is subjected first to an abstract critique for sound methodology and subject matter relevance by the particular conference's organizers, then later critiqued and commented upon by the conference's audience." *Allen v. International Business Machines Corp.*, 1997 WL 34501372, *28 (D.C. Del. 1997); *see also Keller v. MacCubbin*, 60 A.3d 1117, 1118 (Del. Super. Ct. 2013) ("peer reviewed" is a term of art in scientific parlance, not an evaluation).

Dr. Gottfried explained the conference abstract peer review process, including the fact she is a peer reviewer for many organizations that host these conferences, and stated the reviewers provide numerical values for multiple categories, including intellectual merit and innovativeness. Abstracts regarding studies of the Real Child Voices stimulus set were submitted for presentations at five scientific conferences from 2015-2019, the conference organizers sent the abstracts for peer review, and based on the peer review responses, the presentations were approved and given at the conferences. (R., pp. 134-138, 332-333). Thus, studies regarding the efficacy of the Real Child Voices stimulus set have been peer reviewed, and received high enough scores from the peer reviewers to be accepted for presentation at the conferences.

¹South Carolina has not adopted the Daubert factors, but the Jones/Council factors, including peer review and publication, are very similar, and federal courts' analysis of the factors is instructive. *See State v. Warner*, 430 S.C. 76, 842 S.E.2d 361, 366 (Ct. App. 2020) ("Nevertheless, our approach is "extraordinarily similar" to the federal test.")

Finally, the panel overlooked the clearly established and undisputed fact the MUSC lab utilizes two stimulus sets: the Real Child Voices set and the Marshall set. Dr. Gottfried testified the Marshall stimulus set has been utilized in PPGs longer than the Real Child Voices stimulus set, and “there’s more studies concerning the Marshall and that’s the reason we use both.” Judge Jefferson expressly cited Dr. Gottfried’s testimony regarding the peer reviewed articles discussing the Marshall stimulus set used in the MUSC PPG. (R., pp. 111, 216, 330). The panel did not address any aspect of Judge Jefferson’s findings, and never mentioned, much less discussed, the Marshall stimulus set.

4. The panel overlooked Judge Jefferson’s detailed and thorough ruling, and failed to properly apply the required and appropriate standard of review.

Judge Jefferson heard extensive testimony regarding the PPG from two experts, and then in rendering her decision, appropriately made credibility findings and detailed findings of fact on each Jones/Council factor, with specific citation to the evidence she considered regarding each factor. As contemplated by Jones/Council, Judge Jefferson viewed the evidence in light of the reliability of the “science” behind the PPG itself as a scientific test or technique, and expressly found Dr. Gottfried’s experience with the PPG was “extensive,” and her testimony regarding the PPG was “credible.” (R., pp. 179, 214-216, 219).

Regarding peer review and publication, Judge Jefferson found that PPG testing has been subjected to extensive peer review and was the subject of numerous publications. Noting there were no peer reviewed articles regarding the Real Child Voices stimulus set, Judge Jefferson found MUSC also used the Marshall stimulus set on which there were peer reviewed articles. She then cited Dr. Gottfried’s testimony that PPG testing “is generally acceptable within the psychological community.” (R., pp. 214-216).

As to prior application of the method to the type of evidence at issue, Judge Jefferson found MUSC has performed many PPG tests, all of which were conducted in the same manner using Limestone hardware and software. She noted the Limestone system includes the Real Child Voices stimulus set, which is used in between forty and eighty-five PPG labs across the country. (R., pp. 216-217).

Judge Jefferson then made extensive findings regarding the quality control procedures used to ensure the PPG results are reliable. She noted MUSC personnel's training from Limestone on operation of the Limestone system, the multiple calibration of gauges before and during the tests, countermeasures used, humidity and temperature controls inside the PPG test room, and the use of standardized instructions from Limestone. Judge Jefferson further found MUSC uses a more conservative cut-off threshold to determine significant arousals in order to improve reliability and mitigate false positives, and the inconsistency of results between labs is often due to some labs using lower cut-off scores and international labs using child pornography. (R., pp. 217-218).

Regarding recognition of the PPG as a scientific test or technique, Judge Jefferson cited Dr. Gottfried's testimony regarding references to the PPG in the Diagnostic and Statistical Manual of Mental Disorders, 5th Ed. (DSM-V),² which states physiological measures of sexual interest may be useful, and the PPG is the most thoroughly researched and longest used of such measures. She also noted the DSM-V's statement that sensitivity and specificity of PPG results may vary from one lab to another. (R., pp. 218-219).

Expert qualification and admission of an expert's testimony are matters within the trial court's sound discretion, and the trial court's conclusions will not be reversed on appeal absent an

²The DSM-V is the official, peer reviewed publication of the American Psychiatric Association. Matter of Ridley, 433 S.C. 316, 858 S.E.2d 165, 168 (Ct. App. 2021).

error of law or unsupported factual conclusions. State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020). Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it may be offered into evidence, and vigorous cross examination, presentation of contrary evidence and careful instructions on the burden of proof are the traditional appropriate means of attacking admissible evidence. Ridley, 858 S.E.2d at 168-169.

Even though the panel cited the appropriate standard of review, it reversed Judge Jefferson's conclusions with virtually no analysis of the evidence before her, much less her detailed findings with references to the specific evidence on which she relied. The panel cited no error of law, but in a conclusory fashion, focused on the absence of evidence on two things not challenged at trial, discussed in the parties' briefs before this court, or required by any legal authority absent a specific objection (peer review and/or reliability of the Limestone certification standards and MUSC's PPG procedures), and completely overlooked the evidence in the record regarding peer review and reliability of the Real Child Voices stimulus set. The panel also overlooked the extensive evidence regarding the reliability of the PPG in general, as well as its general acceptance in the mental health community, which is the appropriate focus under Jones/Council.

Judge Jefferson clearly took her role as gatekeeper seriously. She heard testimony from two experts, carefully weighed all the evidence presented, and then did what the case law demands regarding the issue of reliability of the scientific test or technique at issue. She made appropriate credibility findings, and then addressed each Jones/Council factor in depth, with citation to the specific evidence on which she relied as to each factor.

In summarily reversing her ruling, the panel overlooked the evidence and Judge Jefferson's thorough analysis. As noted above, the panel's opinion does not even reference Judge Jefferson's analysis, much less find Judge Jefferson's actual factual findings and conclusions lacked

evidentiary support. Accordingly, based on the extensive evidence overlooked by the panel and the appropriate standard of review, the State submits rehearing is warranted.

B. Even assuming error in admitting the PPG evidence, the error was harmless because the PPG evidence presented to the jury was not extensive and the State's reference to it in closing argument was limited.

Finally, after summarily finding admission of the PPG evidence was error, the panel found the error was not harmless “because the testimony was before a jury, it was extensive, the State’s expert called the PPG an ‘objective’ way of determining what sexually arouses a male, and the State emphasized the PPG in its closing, stating ‘his body can’t lie.’” A careful review of the record, however, reveals the PPG evidence presented to the jury was not “extensive,” Dr. Gottfried used the word “objective” once in her entire testimony regarding the PPG, and the State did not emphasize the PPG in closing.³

A harmless error analysis is contextual and specific to the circumstances of the case: “No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.”

State v. Byers, 392 S.C. 438, 710 S.E.2d 55, 60 (2011) (citations omitted) (emphasis added); *see also* State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982) (same). In order to constitute reversible error, the argument must have so infected the trial with unfairness that the resulting verdict is a denial of due process. State v. Elkins, 312 S.C. 541, 436 S.E.2d 178, 180 (1993). When the PPG testimony and references before the jury are considered in light of the State’s entire case, there was extensive evidence other than the PPG to support the jury’s verdict, and it is unlikely the

³The State does not concede admission of the PPG evidence was error. This harmless error analysis is presented solely in response to the panel’s statements.

limited PPG testimony and references so infected the trial with unfairness as to render the verdict a denial of due process.

1. The PPG evidence before the jury was not extensive.

Contrary to the panel's statement the PPG evidence was "extensive," the PPG evidence actually presented to the jury was a small part of the State's total case. The State's case-in-chief as presented to the jury is set forth in the Record on Appeal at pages 248-257, 288-319, 340-375, for a total of seventy-five pages. The PPG testimony starts on page 348 and concludes on page 358, for a total of ten pages. Thus, only 13% of the State's entire case dealt with the PPG, which is not "extensive." Rather, the vast majority of the State's case-in-chief involved Appellant's offenses, psychological tests administered by MUSC, Appellant's scores on actuarial risk assessment tools, statements Appellant made during his interview with Dr. Gottfried, and Dr. Gottfried's ultimate conclusions.

2. Expert's use of the word "objective" was not unduly prejudicial.

The panel opinion focused on one word in the entirety of Dr. Gottfried's testimony regarding the PPG. Dr. Gottfried used the word "objective" once in the beginning of her PPG testimony as part of explaining what the PPG is - a physiological measure of male sexual arousal. (R., p. 348). She subsequently testified the PPG "should never be used as the sole way" to assess sexual arousal. (R., p. 353).

Further, the PPG system provides computer generated, unbiased measurements of changes in penile circumference, which are by definition "objective." Objective means "not biased or prejudiced; fair; impartial." ([https://www.dictionary.com/objective.](https://www.dictionary.com/objective)). The PPG system, not the technician operating it, measures the penile changes, an arousal is either present or it is not, and the system merely records that fact. Thus, the measurements are objective, not subjective. Dr.

Goffried's testimony was accurate, and her single use of the word "objective" does not render her entire PPG testimony unduly prejudicial for purposes of harmless error analysis.

3. The State's reference to the PPG in closing argument was limited.

The panel's statement the State "emphasized" the PPG in its closing argument overlooks the entirety of the closing argument, as well as the context of the PPG reference. The State's closing is set forth in the Record on Appeal at pages 499 through 507. The PPG reference begins in the middle of the closing argument at page 504, line 13, and ends at page 505, line 2, for a total of fifteen lines. The State's closing argument consisted of 190 lines in the transcript, so the PPG reference was only 8% of the entire argument.

Significantly, as noted, the PPG reference was in the middle of the argument, not at the end, which is where the State would have referenced the PPG if it intended "emphasize" it. As with its case-in-chief, the State's closing argument focused primarily on Appellant's sexual offense history, the entire panoply of psychological tests Dr. Gottfried utilized, Appellant's high scores on the actuarial risk assessment tools, and Dr. Gottfried's ultimate opinions.

In support of its harmless error conclusion, the panel cited 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. Rather, it stated the issue before it was "narrow," and held "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." In the face of that limited holding, however, the court then included dicta regarding the PPG in general that went far beyond the "narrow" question before it. *Id.* at 445-446.

The evidence regarding the PPG in this case is starkly different, and more extensive, than the evidence before the court in Bilton, particularly on the "baseline demonstration of reliability"

Bilton required. Indeed, the evidence in this case is exactly what the Bilton court found was lacking in that case, but the panel overlooked it in reversing Judge Jefferson.

C. *En Banc* Review and oral argument requested due to the impact of the panel decision on pending matters and future litigation.

The panel submitted this case on July 27, 2022, and issued the unpublished opinion reversing Appellant's commitment on August 10, 2022. Although the State recognizes an unpublished decision has no precedential value pursuant to Rule 220(b)(1), the panel decision in this case has already been employed as "persuasive" on the PPG issue even with its unpublished designation. In light of the evidentiary issues discussed above, the State submits oral argument was warranted to provide an opportunity to address the panel's issues. Therefore, the State requests *en banc* review of the panel opinion, with oral argument to afford the State a full opportunity to discuss the panel's evidentiary findings and application of the appropriate standard of review.

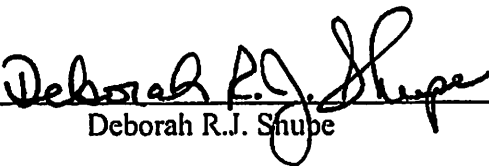
CONCLUSION

Based on the foregoing and the matter set forth in the Brief of Respondent, the State respectfully requests that the panel rehear this case, reverse its unpublished opinion, and affirm Appellant's commitment under the SVPA. In the alternative, the State respectfully requests this matter be submitted to the court *en banc*, and that oral argument be scheduled.

Respectfully submitted,

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September 9, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Deadra A. Jefferson, Circuit Court Judge
Appellate Case No. 2019-001945

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

APPELLANT

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Respondent's Petition for Rehearing and Petition for Rehearing *En Banc* by email to the address reflected in the AIS system, and by depositing a copy in the United States mail, postage prepaid, addressed to:

David Alexander
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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The Petition has also been filed with the Court of Appeals through the AIS system.

I further certify that all parties required by Rule to be served have been served.

This 9th day of September, 2022.


SALLY B. ELLISON
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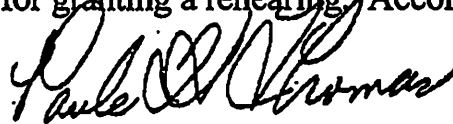
The South Carolina Court of Appeals

In the Matter of the Care and Treatment of Ronald MJ
Gregg, Appellant.

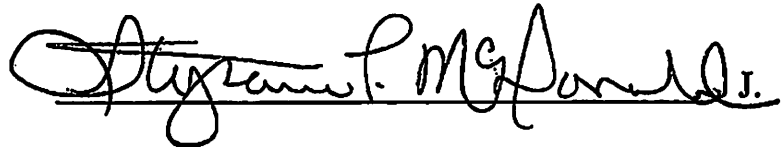
Appellate Case No. 2019-001954

ORDER

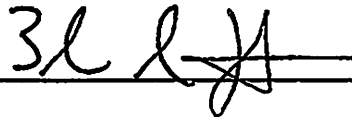
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
Deborah R.J. Shupe, Esquire
David Alexander, Esquire
The Honorable Deadra L. Jefferson

FILED
Nov 08 2022
