

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Spartanburg County
The Honorable R. Keith Kelly, Circuit Court Judge
Court of Appeals Appellate Case No. 2022-000371
Opinion No. 6061

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

RESPONDENT.

**STATE OF SOUTH CAROLINA'S PETITION FOR WRIT OF
CERTIORARI TO THE COURT OF APPEALS**

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies a Petition for Rehearing was made and finally ruled on by the court of appeals on September 6, 2024.

QUESTION PRESENTED

Did the court of appeals err in reversing Judge Kelly's admission of the PPG evidence because it applied an incorrect standard of review, and disregarded Judge Kelly's careful and meaningful exercise of his discretion, as well as the undisputed evidence before him which established the PPG test is a recognized reliable scientific measure of deviant sexual interest in the field of sex offender evaluation and treatment?

STATEMENT OF THE CASE

This Court's certiorari review of the court of appeals opinion in this case is appropriate and necessary because the court of appeals overlooked facts in the record, misapprehended the law related to admissibility of expert opinions and misapplied the appropriate standard of review on appeal. In particular, during a circuit court hearing, consistent with this 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 accepted, scientific evidence to support Judge Kelly's findings and ruling regarding the penile plethysmograph (PPG) testing methodology, reliability and admissibility as it related to the expert's opinion on the question of whether Respondent is a sexually violent predator under South Carolina law.

The court of appeals' apparent *de novo* determination regarding the PPG reliability and admissibility failed to recognize and give due deference to the findings and legal conclusions of Judge Kelly after a full evidentiary hearing. The court of appeals decided the case without oral argument and disregarded the substantial evidence in the record, as well as the multiple

scholarly publications and presentations cited in the State's brief, regarding the general reliability and acceptance of the PPG test.

The State raised these issues in its Petition for Rehearing, which the court of appeals denied. The court of appeals opinion in this case is the first published opinion in South Carolina expressly finding the PPG is unreliable and evidence regarding it is inadmissible, the court of appeals reached that conclusion through impermissible *de novo* review. The reliability of PPG test results, particularly in sexually violent predator proceedings, is an important novel issue in South Carolina. The State now petitions this Court for a writ of certiorari to the court of appeals for the Court to review the court of appeals decision and correct the errors therein.

STATEMENT OF FACTS

In 2010, Respondent 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. Prior to Respondent's release from incarceration, Petitioner State of South Carolina commenced proceedings pursuant to the Sexually Violent Predator Act (SVPA) seeking Respondent'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, Respondent moved to exclude any testimony by the State's expert regarding a penile plethysmograph (PPG) performed during a comprehensive psychosexual evaluation of Respondent's mental status and risk to reoffend sexually, and the State filed a Memorandum in Opposition to the Motion. (Appendix pp. 414-436). 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) and Director of the Sexual Behavior Clinic and Lab (SBCL), was qualified as an expert in forensic psychology. Dr. Gottfried was also specifically qualified as an expert, by stipulation, on the PPG and was the sole witness at the Council hearing.¹ (Appendix p. 20).

Dr. Gottfried testified that consistent with best practices in the field, she conducts a comprehensive evaluation that uses data from multiple sources, including a clinical interview with the person, and all collateral information such as mental health records, medical records, detention center and prison records. She utilizes a battery of assessment measures, including the PPG, to look for risk factors and other factors to guide her clinical opinion. (Appendix p. 25).

Dr. Gottfried is specifically trained and certified to conduct PPGs and interpret the results by the manufacturer of the PPG system used at MUSC. The training includes classroom/online instruction on the history, background and literature of the PPG test, two or three full day training sessions requiring actual administration and interpretation of PPG tests in real time, and submission of PPG test results that are reviewed for accuracy. (Appendix p. 26).

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,

¹ Dr. Gottfried's extensive credentials are set forth in the State's Brief at pages 3-4.

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. (Appendix pp. 31-33).

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. (Appendix pp. 30-33).

A national professional organization's 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, and Dr. Gottfried testified "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. Dr. Gottfried also testified the Diagnostic and Statistical Manual, 5th Ed., (DSM-5) recognizes use of the PPG test, and 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 and 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. (Appendix pp. 33-40).

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. For example, 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. (Appendix pp. 40-41).

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.” (Appendix pp. 41, 47-48).

As noted above, the SBCL’s conservative cut score of 5mm increase in penis circumference minimizes the possibility of false positive results. The SBCL 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. (Appendix pp. 41-45).

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. The SBCL uses both the Marshall set and the RCV set in order to gather as much data as possible. The RCV stimulus set has been peer reviewed, and studies have been approved for presentation at professional conferences and the literature suggests visual plus audio has the highest reliability. (Appendix pp. 49-54).

As to Respondent, Dr. Gottfried testified that all the evaluators diagnosed him with pedophilic disorder, sexually aroused to female children, exclusive type, but Respondent never admitted he was sexually aroused by children. The PPG test was important to help determine whether Respondent was currently sexually aroused by children and had no strategies to mitigate his arousal. (Appendix pp. 50-53).

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.² (Appendix pp. 55-57).

Judge Kelly took the matter under advisement, and 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. He further found that the PPG test is used in over fifty laboratories throughout the United States and some international labs, and while there are different standards for some countries, there is a standard application of the PPG test in the United States. (Appendix pp. 143-144).

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. He further found that her testimony regarding how the PPG test is administered also satisfied the quality control requirement. (Appendix pp. 144-145). He found that 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 Respondent's arguments went to the weight of the evidence, not its admissibility. (Appendix pp. 145-146).

Before the jury, Dr. Gottfried was qualified by stipulation 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. In

² Dr. Gottfried's pre-trial testimony is set forth more fully at pages 4-8 in the Brief of Respondent before the court of appeals.

conducting Respondent's evaluation, Dr. Gottfried reviewed police and court documents related to his sex offenses, records related to Respondent's incarceration, Respondent'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. (Appendix pp. 173-185).

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. As to Respondent, Dr. Gottfried found it significant that he did not have a nonsexual criminal history, and his criminal sex offenses were restricted to prepubescent females. (Appendix pp. 185-187). She then testified about Respondent's sexual convictions and the facts of those offenses and stated 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.³ (Appendix pp. 187-210, 525-533).

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 Respondent had additional 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 Respondent with pedophilic disorder, but concluded

³Dr. Gottfried's testimony regarding Respondent's sexual offenses is set forth more fully at pages 9-13 in the Brief of Respondent before the court of appeals.

he did not meet the criteria for civil commitment under the SVPA. (Appendix pp. 214-216).

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. (Appendix pp. 216-219).

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. (Appendix pp. 221, 226-237). As to Respondent’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.” (Appendix pp. 237-239).

Based on all the data points she gathered, Dr. Gottfried diagnosed Respondent with pedophilic disorder, exclusive type, sexually aroused to female prepubescent children, and explained the basis for her diagnosis. She then testified about actuarial risk assessments she completed, multiple dynamic risk factors for reoffending sexual that Respondent exhibited, he had not received any sex offender treatment, and he did not have a support system that might

mitigate his risk to reoffend.⁴ (Appendix pp. 239-265).

Jury Verdict/Appeal

The jury found beyond a reasonable doubt that Respondent is a sexually violent predator, and the circuit court placed him in the custody of the South Carolina Department of Mental Health for long term control, care and treatment. (Appendix pp. 537-538, 565). This appeal followed.

By published opinion filed June 12, 2024, a court of appeals panel, without oral argument, reversed Respondent's commitment, finding Judge Kelly erred in allowing the PPG testimony because the PPG is unreliable and that the error was not harmless. (Appendix, pp. 633-640). The State filed a Petition for Rehearing, raising issues regarding the appellate standard of review and the court of appeals' failure to properly analyze the PPG evidence presented to Judge Kelly. (Appendix, pp. 641-655). By Order filed September 6, 2024, the court of appeals denied the State's petition. (Appendix, p. 657). The State now petitions for a writ of certiorari to the court of appeals for this Court to review the court of appeals' decision.

ARGUMENT

The court of appeals erred in reversing Judge Kelly's admission of the PPG evidence because it applied an incorrect standard of review, and disregarded Judge Kelly's careful and meaningful exercise of his discretion, as well as the undisputed evidence before him which established the PPG test is a recognized reliable scientific measure of deviant sexual interest in the field of sex offender evaluation and treatment.

Respondent Shawn Daily contended Judge Kelly erred in admitting Dr. Gottfried's testimony regarding the PPG test conducted as part of her comprehensive psychosexual

⁴The actuarial 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.

evaluation of Respondent’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. The court of appeals agreed, expressly finding the PPG is unreliable, and the error in admitting the PPG evidence was not harmless. In reaching its conclusions, the court of appeals ignored significant, undisputed evidence regarding the PPG’s reliability and its admissibility as a factor considered by the State’s expert in formulating her opinion, as well as the numerous peer reviewed publications and presentations regarding the PPG that were cited in Petitioner’s brief.

A. The court of appeals failed to apply the required and appropriate standard of review.

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.

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 the trial court’s rulings were based on an error of law or were unsupported by evidence in the record. State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020); State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009); *see also* State v. Davis-Kocsis, Op. No. 28213, 2024 WL 3169855 at *3, n. 2 (S.C. Sup. Ct. filed June 26, 2024) (appellate court’s standard of review regarding evidentiary rulings is “simply to determine whether the trial court acted within its discretion,” and “[i]f so, we affirm”). The exercise of discretion means “the trial

court—when ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it.” State v. Wallace, 440 S.C. 537, 892 S.E.2d 310, 312–13 (2023) (citing Morris v. BB&T Corp., 438 S.C. 582, 885 S.E.2d 394, 397 [2023]).

The trial court’s recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process; and when a trial court’s thought process of applying sound principles of law to the court’s view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court’s exercise of discretion, even when the judges on the appellate court might have made the decision differently. Morris at 397. 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. In re Matter of Ridley, 433 S.C. 316, 858 S.E.2d 165, 168-169 (Ct. App. 2021).

Even though the court of appeals cited the appropriate abuse of discretion standard of review, it reversed Judge Kelly’s conclusions with **no analysis** of the evidence before him, much less his detailed findings on each Jones/Council factor with references to the specific evidence on which he relied. The court did not find any of Judge Kelly’s findings and conclusions lacked evidentiary support and cited no error of law, but in a conclusory fashion, overlooked the extensive evidence before Judge Kelly regarding the reliability of the PPG, particularly in relation to the Jones/Council factors.

It is clear from the record that Judge Kelly recognized his responsibility to exercise his discretion regarding admissibility of PPG evidence, and he meaningfully engaged in exactly the deliberative process described in Wallace and Morris.⁵ Rather than fully analyze the evidence and Judge Kelly's findings, the court of appeals focused on one statement regarding standardization in Dr. Gottfried's in-depth pre-trial testimony, which it took out of context and only quoted in part. In essence, instead of applying the appropriate abuse of discretion standard of review, the court of appeals engaged in a *de novo* review and substituted its judgment for Judge Kelly's without finding abuse of discretion as to any of Judge Kelly's findings or conclusions. An appellate court's distaste for a particular scientific test or evidence is not a basis for overruling a trial court's comprehensive and well-reasoned analysis and ruling regarding the evidence's admissibility. *See Morris; Wallace; State v. Phillips*, 430 S.C. 319, 844 S.E.2d 651, 662 (2020) (appellate courts analyze the admissibility of scientific evidence for the first time when the trial court fails to meaningfully exercise its discretion).

During the pre-trial hearing, Dr. Gottfried was qualified (by stipulation) as an expert in forensic psychology as well as the field of penile plethysmography. Her PPG testimony was virtually undisputed, but the court of appeals dismissively summarized Dr. Gottfried's pre-trial testimony while ignoring the context or full content of her testimony.

Significantly, the court of appeals stated Dr. Gottfried had “about 36 peer-reviewed publications or book chapters in peer-reviewed scholarly books” regarding the PPG, but she actually testified the PPG has been the subject of “**over a hundred**” peer reviewed studies and publications in the general sexual health and sexual offending literature, and there had been

⁵The evidence before Judge Kelly and his detailed ruling regarding admissibility of PPG evidence are set forth in detail at pages 3-9 of the Final Brief of Respondent before the court of appeals, with citations to the record, and are incorporated herein by reference.

“over sixty” professional conference presentations regarding the PPG. (Appendix pp. 23-24) (emphasis added). In addition, the PPG is acknowledged in the Diagnostic and Statistical Manual, Fifth Edition (DSM-5) and discussed at length in the “Sexually Violent Predators: A Clinical Science Handbook” as useful in the field of assessing people for civil commitment as sexually violent predators. (Appendix pp. 36-40. By ignoring or downplaying this evidence, the court of appeals avoided analyzing Judge Kelly’s finding regarding the PPG’s documented merits.

The court of appeals noted Dr. Gottfried “opined that SVP programs in Minnesota, California, Illinois, New York and possibly Missouri use the [Real Child Voices] methodology for treatment programs.” Then, by way of footnote, the court of appeals stated Dr. Gottfried “mentioned” those jurisdictions used the PPG “for precommitment,” but her reference to “programs” only meant the treatment programs. While Dr. Gottfried did subsequently clarify that her reference to “programs” was to SVP treatment programs in those jurisdictions, she definitively stated that evaluators in the states also used the PPG for precommitment evaluations and annual reviews. (Appendix pp. 46, 68-69). In short, it was undisputed that the PPG is used in those jurisdictions for evaluations as well as treatment.

The court of appeals further stated (and then emphasized) that Dr. Gottfried “admitted the PPG had standardization issues,” but ignored the context of her testimony regarding standardization. Specifically, Dr. Gottfried testified:

[S]tandardization is an issue, and really what’s driving that is that other countries can do things that other countries can’t do. So, for example, my colleagues in Canada have been administering PPGs for at least 30 years, and they have been using the same stimuli for a very long time. That stimuli includes nude children, which we cannot use here in the U.S. And so, when I’m working with this international standardization group that I’m a part of, there’s a lot of discussion about them having to change things that they’ve been using for a long time that works for them just because now, when we’re trying to internationally standardize

it, they don't want to change their methods, because this is what works for them; they're allowed to use it. So I'd say that's probably the biggest criticism.

(Appendix pp. 32, 40-41) (emphasis added). Thus, rather than generally stating there are standardization issues with the PPG, Dr. Gottfried clearly indicated the standardization criticism arises primarily from international differences between what labs in some countries can use as stimuli that labs in other countries cannot use.

In addition, the court of appeals stated Dr. Gottfried "admitted" the PPG "did not always have expected results." Again, the court of appeals ignored the context and full extent of Dr. Gottfried's testimony on that issue. She testified:

Another [criticism] is that it's been noted that the PPG doesn't always have expected results. And so, for example, it's been noted that somebody who had offenses against children, they don't always show arousal while undergoing a PPG to children. And to me, I don't understand that argument for a couple of different reasons, but the main one is, is that we know that people offend against children for numerous reasons. Arousal to children is only one of them. There are people who sexual (sic) offend against children who are not sexually aroused by children, and so you would expect that those people wouldn't be aroused to children on the PPG.

(Appendix p. 41). On cross-examination, Dr. Gottfried reiterated "there's been some commentary or criticism in the literature" that men who have offended against children do not always show sexual arousal to children on the PPG, but she again testified that having a paraphilic interest in children is only one reason people sexually offend against children, and if they offend for a non-paraphilic reason, they would not be expected to show paraphilic arousal on the PPG. (Appendix p. 67). In other words, Dr. Gottfried did not "admit" the PPG has unexpected results, and to the contrary, she indicated such criticism was not well founded.

The court of appeals also truncated Dr. Gottfried's PPG testimony before the jury, again reducing it to criticism regarding PPG standardization and expected results. As it did with the

pre-trial testimony, the court ignored the context and full content of Dr. Gottfried's testimony on those issues.

As discussed above, similar to her pre-trial testimony, Dr. Gottfried's trial testimony explained what the PPG is and how it works, that there were international standardization issues, and explained why standardization between different countries is problematic. (Appendix pp. 232-233). As to the expected results issue, Dr. Gottfried stated some of "the literature" referenced unexpected PPG results related to people who sexually offend against children and do not show arousal to child stimuli during the PPG, but "[t]here have been a lot of studies looking at the reliability of the PPG and its ability to differentiate between people who offended against children and people who haven't," and the big studies "really showed that the PPG has the greatest validity and reliability" "for people who are aroused by children." (Appendix p. 233-237).

Dr. Gottfried did state Respondent's PPG results "were right in line with his offenses," and his clinically significant arousal to trials featuring sexual activities with prepubescent females was "really consistent with his offense behaviors."⁶ Significantly, however, she also testified about Respondent's responses when she discussed the results with him, including that he "was disheartened" about them and said he did not feel aroused during the scenarios but was "tense" and "mad at the aggressor." (Appendix pp. 237-239). That was the extent of her direct testimony about Respondent's PPG test.

Critically, the court recognized "there may be contrary authority finding the PPG is reliable and probative." (emphasis added). The case law from Washington and Illinois that the court cited definitively held, after extensive analysis, that the PPG is reliable and probative.

⁶Respondent actually conceded the PPG results were "expected" because he has pedophilia (discussed below).

Rather than consider the analysis in those cases, however, the court relied on dicta from In re Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), stating the PPG is “controversial and has been criticized for a lack of standardization and for being subject to manipulation,” and courts have “uniformly” found PPG tests results are inadmissible due to a lack of accepted standards for the test in the scientific community. The court then cited outdated case law and articles as support, while ignoring the extensive and more recent research, publications and presentations cited and discussed in the State’s brief before the court of appeals, none of which were refuted by Respondent.

The court failed to apply the required abuse of discretion standard of review, ignored substantial evidence in the record, and substituted its judgment for Judge Kelly’s well-reasoned ruling. Accordingly, the Court should grant certiorari to review the court of appeals opinion and affirm Judge Kelly’s appropriate, careful and meaningful exercise of his discretion.

B. The court’s harmless error analysis overlooked other overwhelming evidence that supported the jury’s verdict, and it mischaracterized Dr. Gottfried’s testimony before the jury.

Even assuming error, the court of appeals’ harmless error analysis was fundamentally flawed. In determining the purported error in admitting the PPG evidence was not harmless, the court of appeals again focused on very limited testimony regarding the PPG without considering that testimony in context and in relation to the entirety of the evidence as required by well-established South Carolina case law.⁷

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893, 897 (2003). “A harmless error analysis is contextual and

⁷The State does not concede error in the admission of the PPG evidence, rather, as set forth above, contends there was no error. This harmless error analysis is only in response to the court of appeals’ harmless error analysis and conclusion.

specific to the circumstances of the case,” and “the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Heller, 399 S.C. 157, 731 S.E.2d 312, 320 (Ct. App. 2012) (emphasis added).⁸ “It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence.” State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611, 613 (1983).

As with its PPG analysis, the court of appeals set forth the correct harmless error standard, then failed to apply it. Rather than considering the PPG trial testimony in context and reviewing the case before the jury as a whole, the court of appeals simply concluded the PPG evidence may have contributed to the jury’s verdict, and therefore, error in admitting the PPG evidence was not harmless.

In finding admission of the PPG evidence was not harmless, the court of appeals overlooked other, and indeed overwhelming, evidence in the record that more than supported the jury’s verdict, even without any of the PPG evidence. Significantly, Dr. Gottfried and the DMH evaluator both diagnosed Respondent with pedophilic disorder, exclusive type, sexually aroused to female prepubescent children; they both based their diagnosis on Respondent’s significant sex offense history against prepubescent females and found his sexual attraction to children was current and ongoing; they both found Respondent had engaged in grooming behavior in his sex offenses; they both reached the same scores on the actuarial risk assessments, and testified the scores put Respondent in the average risk to reoffend sexually category when compared to other routine sex offenders who had reoffended sexually, but that did not necessarily equate to an individual’s actual risk; they both found Respondent had multiple dynamic risk factors for sexual

⁸All evidence is meant to be prejudicial; only unfair prejudice must be scrutinized. *See State v. Gray*, 408 S.C. 601, 759 S.E.2d 160, 168 (Ct. App. 2014).

reoffending; they both testified pedophilic disorder is chronic but can be treated; they both found Respondent needs treatment for his pedophilia; and they both noted Respondent had not had any sex offender treatment even though he did have an opportunity to get it while he was incarcerated. (Appendix pp. 183-218, 240-265, 293-295, 309-318, 323, 325-342).

Thus, in terms of the SVPA statutory elements, both experts found Respondent has a mental abnormality that is causally connected to his sexual offending and makes him a risk to sexually reoffend if not treated. The only real point of demarcation between the expert's opinions was whether Respondent needed to be confined for the treatment he needs to control his pedophilic arousal and urges. The difference in their conclusions on this issue centered on what support system and accountability Respondent would have if released, which not only had nothing to do with the PPG, it did not go to Respondent's diagnosis, his need for treatment, or even his responses or urges; rather it was a factor completely separate from the medical realm.

Dr. Gottfried testified Respondent had acted on his sexual arousal to children, and "there's nothing that he has demonstrated or that has been done that suggests that he's going to be able [to] stop himself from acting on it again." She stated that Respondent planned to live with his family, get a job, and work with a pastor on rehabilitation and spiritual growth, but nothing indicated Respondent's support system might mitigate his risk to reoffend, he "had no realistic strategies" to control his risk, and he did not know how to avoid reoffending. (Appendix pp. 260-264).

On cross-examination and re-direct examination, Dr. Gottfried testified she was aware Respondent had probation through January 2025, he would be required to wear a GPS device upon release, and it was likely his probation would require that he seek treatment. She stated she considered all those facts in her evaluation. Further, she stated the support system Respondent

would have if released was essentially the same support system he had when he was offending. (Appendix pp. 284-286, 297-298).

The DMH evaluator testified Respondent did not need to be confined for treatment because he would be on probation and receive treatment, which would help him work on “things that are still problems for him,” he would be monitored at home and by the justice system, and if he was unable to manage his “situation,” he would be put in a more restrictive environment. He stated Respondent’s parents would be “good supports for him in the community in a risk-relevant way,” that would “help mitigate or lessen his risk in the community,” and they recognized Respondent has “chronic problems that plague [Respondent]; that’s lifelong.” On cross-examination, The DMH evaluator acknowledged Respondent “does have some treatment needs,” and sex offense specific treatment would “come in handy.” (Appendix pp. 318-324, 340-342).

Respondent’s mother testified her husband was 73 years old with health problems, including “forgetfulness,” she has Parkinson’s disease, she was willing to let Respondent live with and her husband, and she was aware of the conditions of his probation. She acknowledged she could not control Respondent, but stated she would make him leave her home and she would call the authorities if she knew Respondent did something he should not do, which would necessarily be after the fact of Respondent’s misconduct. (Appendix pp. 350-355).

The jury heard from two experts who agreed on virtually everything except Respondent’s need to be confined for treatment. As noted above, neither expert’s opinion on that issue hinged in any way on the PPG test results, and they did not even reference the PPG when explaining the basis for their opinions on the issue. Rather, their opinions focused on the sufficiency of Respondent’s support system if released.

Dr. Gottfried was aware of Respondent's probation requirements and his plan to live with his parents and explained why she thought that was inadequate to prevent Respondent from reoffending. The DMH evaluator's opinion was based on Respondent's probation, his mother's supervision, and the ability of the legal system to control Respondent's conduct. Significantly, the jury also heard Respondent's mother concede she could not control Respondent even if he lived in her home, which undermined the DMH evaluator's analysis regarding the strength of Respondent's support and accountability system in the community.

The jury was free to accept or reject either expert's opinion on the issue of whether Respondent should be confined to receive the treatment both experts opined he needs. Even without the PPG evidence, there was more than sufficient, indeed overwhelming, evidence to support the jury's determination that Respondent has a mental abnormality (undisputed), his sexual offending was caused by his mental abnormality (undisputed), he needed treatment to help manage his current and on-going deviant urges and arousal (undisputed), and he needed to be confined for that treatment because his restrictions and community support were insufficient. In light of that evidence, any error in admitting the PPG evidence was harmless beyond any reasonable doubt.

Finally, the court of appeals made much of the fact that Dr. Gottfried was the State's sole witness, and stated that "a significant portion of her testimony centered on the PPG test." While it is true Dr. Gottfried was the State's only witness, classifying her PPG test testimony as "a significant portion of her testimony" is misleading and inaccurate.

As to the extent and significance of Dr. Gottfried's PPG testimony, her direct testimony is on pages 168-261 (93 pages) of the Record on Appeal, and her entire PPG testimony during the State's case is on pages 222-235 (13 pages - 14% of her entire testimony). The vast majority

of her PPG direct testimony (pages 222-233 – 11 pages) was devoted to explaining what the PPG is, describing the test machine and how it works, the standardization and expected results issues (which the court of appeals used to find the PPG is not reliable), and MUSC’s training and protocols for every PPG performed in its lab. Her testimony regarding Respondent’s test is found on pages 233-235 of the Record on Appeal, for a total of two pages (2% of her entire direct testimony).

In short, eighty pages (86%) of Dr. Gottfried’s direct testimony was devoted to her credentials and evidence other than the PPG, including: the facts of Respondent’s sex offenses against prepubescent female children; the battery of psychological tests in her evaluation protocol and Respondent’s results on those tests; Respondent’s statements to her during the clinical interview; her diagnosis of pedophilic disorder, exclusive type, sexually aroused to female prepubescent children; the actuarial risk assessments she used and Respondent’s level of risk according to those assessments; Respondent’s dynamic risk factors for reoffending; Respondent’s need for treatment and lack thereof; Respondent’s support system in the community if released; and her ultimate opinion that Respondent met the criteria for civil commitment under the SVPA. Fourteen percent, or substantially less than one-fifth, of Dr. Gottfried’s entire direct testimony hardly constitutes a “significant portion of her testimony.”

Dr. Gottfried’s only other testimony regarding the PPG occurred during cross-examination. Respondent’s counsel questioned her briefly about Respondent’s PPG test, focusing on Respondent’s failure to show any arousal to the Marshall stimulus set, that Respondent’s results were “exactly what [Dr. Gottfried] expected,” and that **“it’s what we all know, he - - he has a pedophilic disorder.”** (Appendix pp. 277-276) (emphasis added). Thus, even considering Dr. Gottfried’s cross-examination testimony, her PPG testimony was not a

“significant portion of her testimony.” Further, the PPG results evidence was arguably cumulative to the undisputed evidence that Respondent has pedophilia, an issue Respondent conceded, with current and on-going sexual arousal to prepubescent children (discussed above).

The State briefly referenced the PPG test during closing argument as only one data point in Respondent’s comprehensive psychosexual evaluation, focusing instead on the thoroughness of Dr. Gottfried’s evaluation, Respondent’s offenses, Respondent’s statements to Dr. Gottfried, the issues the two experts agreed on, and the basis for the DMH evaluator’s opinion Respondent did not need to be confined for treatment. (Appendix pp. 364-376). More significantly, Respondent’s counsel argued in closing that **the PPG merely showed Respondent had a pedophilic disorder, which he admitted.** (Appendix pp. 380-381). Thus, contrary to the court’s characterization of Dr. Gottfried’s testimony as “centered on the PPG test,” the PPG was actually a minimal part of her testimony, the State did not emphasize it in closing, and Respondent admitted the results were expected.

In concluding the purported error in admitting the PPG evidence was not harmless, nothing in the court of appeals’ opinion indicates the court of appeals considered or analyzed any of the other undisputed evidence before the jury. Accordingly, this Court should grant certiorari to review and correct the court of appeals’ flawed harmless error analysis.

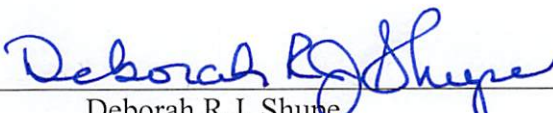
CONCLUSION

Based on the foregoing, and the matter set forth in the Brief of Respondent and Petition for Rehearing, the State respectfully petitions for a writ of certiorari to the court of appeals for this Court to review the court of appeals decision, correct the court of appeals’ error by affirming Judge Kelly’s findings and conclusions regarding admissibility of the PPG testimony that were amply supported by the evidence, and reinstate the well-supported jury verdict finding

Respectfully submitted,

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