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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County
The Honorable Roger E. Henderson, Circuit Court Judge
Court of Appeals Appellate Case No. 2021-000734
Opinion No. 2024-UP-271

IN THE MATTER OF THE CARE AND TREATMENT OF ANDY EUGENE
HYMAN,

RESPONDENT.

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

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 The court of appeals erred in reversing Judge Henderson’s admission of the PPG evidence because it applied an incorrect standard of review, and ignored Judge Henderson’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. 13

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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 20, 2024.

QUESTION PRESENTED

Did the court of appeals err in reversing Judge Henderson's admission of the PPG evidence because it applied an incorrect standard of review, and ignored the substantial evidence before Judge Henderson that 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 in this case because this court failed to apply the appropriate standard of review, overlooked evidence in the record, and misapprehended the law related to admissibility of expert opinions. In particular, this court's apparent *de novo* determination regarding the reliability and admissibility of the PPG evidence failed to analyze the extensive pre-trial evidence regarding the reliability of PPG testing presented during a full pre-trial evidentiary hearing consistent with 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) (hereinafter Jones/Council). In reversing Judge Henderson's ruling that the PPG was reliable, the court of appeals disregarded significant evidence regarding the PPG's reliability and its admissibility as a factor considered by the State's expert in formulating her opinion that Respondent Andy Eugene Hyman meets the criteria for commitment as a sexually violent predator under South Carolina law. The court of appeals' error analysis was directly premised on the court

of appeals' opinion in Matter of Daily, ___ S.C. ___, 905 S.E.2d 310 (Ct. App. 2024), which Petitioner asserts was itself erroneous.¹

In addition, even assuming error, which Petitioner disputes, the court of appeals' harmless error analysis is fundamentally flawed. The court of appeals focused on limited testimony and argument regarding the PPG evidence without considering that evidence and argument in context and in relation to the entirety of the evidence and argument as required by well-established South Carolina case 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 Henderson after a full evidentiary hearing. The court of appeals disregarded the substantial evidence in the record, as well as the multiple scholarly publications and presentations cited in Petitioner's Final Brief of Respondent, 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. While the court of appeals opinion in this case is unpublished, it is premised primarily on the opinion in Daily, which was the first published opinion in South Carolina expressly finding, through an impermissible *de novo* review, that the PPG is unreliable and evidence regarding it is inadmissible. The reliability of PPG test results, particularly in sexually violent predator proceedings, is an important novel issue in South Carolina, and 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.

¹A Petition for Writ of Certiorari to the Court of Appeals is pending in Daily.

STATEMENT OF FACTS

In 2016, Respondent Andy Eugene Hyman pled guilty in Florence County to one count of criminal sexual conduct with a minor in the third degree and was sentenced to ten years' incarceration. 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 June 7, 2021, before the Honorable Roger E. Henderson, 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. Before swearing the jury, the circuit court conducted a full evidentiary hearing pursuant to State v. Council,² during which Marie Gehle, Psy.D., of DMH, testified for Respondent, and Emily Gottfried, Ph.D., of the Medical University of South Carolina (MUSC), testified for the State.

Pre-Trial Hearing

Dr. Gehle

Dr. Gehle testified she is a clinical forensic psychologist with DMH, she conducts pre-commitment evaluations under the SVPA, and she has never utilized the PPG test because she believes it is not standardized which makes it unreliable. She stated everyone conducting PPG tests uses different stimulus sets, and there is no research on the stimulus sets utilized in MUSC's PPG tests, particularly the Real Child Voices (RCV) stimulus set. She also testified about a "best

²335 S.C. 1, 515 S.E.2d 508 (1999).

practices” book regarding evaluation of sexually violent predators, which recommended not using the PPG test as part of such evaluations. (Appendix, pp. 11-25).

On cross-examination, Dr. Gehle acknowledged the “best practices” book she referenced was published in 2009, and stated she was unaware of any updates since the original publication. She stated she remembered looking at articles from 2019 and 2020, and the 2019 article was about a collaboration of professionals regarding PPG standardization issues. She testified she was not trained to administer a PPG test, she had no expertise in using the PPG test, she had never published any articles about the reliability of the PPG, and she had never seen a PPG test performed. In addition, she was unaware of a 2019 meta-data study out of Washington State which found the PPG test had a 92% reliability factor in reproducing results indicating a pedophilic disorder. (Appendix, pp. 25-32).

Dr. Gottfried

Dr. Gottfried is an Assistant Professor of Psychiatry and Behavioral Sciences at MUSC, and the Director of MUSC’s Sexual Behaviors Clinic and Lab (SBCL). In her capacity as Director, she oversees all SBCL administrative duties, performs most of the evaluations, as well as overseeing and providing treatment. She is a clinical member of the Association for Treatment of Sexual Abusers (ATSA), and sits on the Executive Committee of the American Psychology and Law Society, and the Executive Board for the Clinical Psychology Section of the American Psychological Association. She has twenty-six peer reviewed published articles, including an article comparing the PPG test’s use in Canada, the United Kingdom and the United States, has written book chapters about best practices in sexual behavior evaluations that included information about the PPG test, and has given research presentations regarding the PPG test at national and international conferences. (Appendix, pp. 34-37).

Dr. Gottfried orders PPG tests for all adult men being evaluated at the SBCL. She is trained and certified to administer and interpret the PPG test by Limestone Technologies, which developed and manufactures the PPG test machine and software used in the SBCL. The SBCL is certified by Limestone as a clinical and research laboratory, which is the highest level of certification. (Appendix, pp. 39-40).

Research literature indicates that sexual arousal to non-consensual abusive scenarios is a strong predictor of sexual recidivism, and the PPG test provides a physiological measure of male sexual arousal. The PPG test has been peer reviewed in both the sex offender and general sexual behavior literature.

The SBCL has a standard protocol used in every PPG test performed there. The test room is climate controlled, including the humidity and temperature, and the gauge used in the test must be calibrated using a five step process 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, etc. The SBCL also uses a very conservative cut score for significant arousal to minimize the possibility of false positive results. (Appendix pp. 42-47).

The ATSA practice guidelines support responsible use of the PPG test as a data point in sexual behavior evaluations and treatment. Dr. Gottfried testified that “responsible use means you are following the protocol,” “interpreting the results in a standardized manner,” and “not using [the PPG test results] as the sole data point to look at risk, release recommendations, diagnosis.” (Appendix, pp. 48-49).

Dr. Gottfried testified the recommendation not to use the PPG in the 2009 book Dr. Gehle referenced was premised on a 2006 article from Bill Marshall, who subsequently published another

article in 2014 “that was much more supportive of the PPG.” She stated research since 2009, including the 2019 meta-analysis of data from thirty to fifty studies with PPG test results of over 10,000 men, addressed many issues identified in earlier PPG test research. In addition, the Diagnostic and Statistical Manual, 5th Ed., (DSM-5) recognizes use of the PPG test. (Appendix, pp. 49-50).

Dr. Gottfried testified men who sexually offend against children may do so for multiple reasons that are not due to sexual arousal to prepubescent children, and the PPG test is most reliable in differentiating between men who have sexual arousal to children and those who do not. The 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 that when compared to other groups, the men who had offended against children showed “really robust differences [and] much greater arousal to the child scenarios than the other groups.” Appendix, pp. 50-53).

The SBCL uses the RCV stimulus set, which comes with every PPG test system from Limestone and is used in between fifty and one hundred labs, as well as the Minnesota, California, New York, Illinois, and Missouri sexually violent predator programs. The SBCL also uses the Marshall stimulus set, which has been used and researched for many years. Dr. Gottfried testified the SBCL uses both sets because “[w]e want to do a multi-method assessment where we’re measuring the same thing in multiple different ways.” (Appendix, pp. 54-55).

Dr. Gottfried testified research regarding the PPG test has been increasing, and a 2019 “best practices” book regarding sexually violent predator evaluations includes a chapter discussing the utility of using the PPG test in sexually violent predator evaluations. She emphasized she uses

the PPG test results as one data point, and does not base any diagnosis or opinion solely on it. (Appendix, pp. 57-58).

On cross-examination, Dr. Gottfried testified she was working on a couple of studies regarding the RCV stimulus set, but none of the studies had been published in peer reviewed journals yet. She also testified she was participating with international partners in studies comparing the RCV, Marshall and other stimulus sets, and abstracts of those studies had been peer reviewed by scientific committees and accepted for presentation at national and international research conferences, including the American Academy of Forensic Sciences, the International Association for Sex Research, the American Psychology and Law Society, and ATSA. (Appendix, pp. 59-61).

Dr. Gottfried again testified that everyone in the SBCL is certified by Limestone to administer the PPG test, which included having Limestone conduct on-site inspections of the PPG lab and procedures. She stated she did not know if other certifications were available, or what companies other than Limestone do. (Appendix, p. 62).

In order to minimize the possibility of false positive PPG test results, the SBCL uses a cut score of 5mm change in tumescence to establish a clinically significant arousal. The SBCL's cut score is double the research literature's recommended cut score of 2.5mm. They also look for consistency between the person's offense history and self-report, as well as response consistency across multiple stimulus sets. (Appendix, pp. 65-67).

Pre-Trial Ruling

At the conclusion of testimony, Respondent acknowledged there are studies regarding the PPG test, but his "concern" was the RCV stimulus set used in the Limestone system, which was not part of a "peer-reviewed study showing its validity," and the Limestone certification was "not

necessarily the same as being certified by some kind of independent agency.” The State responded that Dr. Gottfried testified there was considerable literature finding the RCV and Marshall stimulus sets are reliable, and the PPG test results was only one data point she considered in her evaluation. The State further argued the PPG test evidence was relevant to show Respondent’s current arousal pattern. Judge Henderson found that given the circumstances of the case, the probative value of the PPG test evidence outweighed the prejudice, and the evidence was admissible. (Appendix, pp. 67-72).

Dr. Gottfried’s Trial Testimony

Before the jury, Dr. Gottfried testified MUSC was retained to perform a pre-commitment evaluation of Respondent pursuant to the SVPA. As part of her evaluation protocol, she reviewed criminal history records, incident/police reports relating to the person’s offenses, prison records, medical records, and mental health records. Respondent was transported to MUSC on several occasions for psychological and physiological testing, and a clinical interview, which included reviewing the tests results with him. (Appendix, pp. 97-110).

Dr. Gottfried testified Respondent pled guilty in 1997 to one count of criminal sexual conduct second degree and one count of lewd act on a minor. (Appendix, pp. 392-394). The charges involved three female victims, two were six years old and one was eight years old. During the interview, Respondent told Dr. Gottfried he fondled two of the girls, got them to grab his penis, and he may have rubbed his penis in their genital area and played with their butt. The third victim was Respondent’s neighbor, and he said he talked her into taking her clothes off because he wanted to see her. Respondent said he talked the victims into engaging in the behaviors with him, and told them not to tell anybody because he would get in trouble.

In 2016, Respondent pled guilty to one count of criminal sexual conduct with a minor third degree - commit/attempt lewd act on minor under sixteen years of age. (Appendix, pp. 395). The charges involved three female victims, who were five, seven, and eight years old. Respondent told Dr. Gottfried he did not offend against the five- and seven-year-old victims, but he did offend against his eight-year-old niece by fondling her, feeling her chest, her genitals and her butt, and rubbing his penis on her, and he did this four or five times. Respondent then admitted he performed oral sex on his niece and got her to put her mouth on his penis. In addition to the 1997 and 2016 convicted offenses, Respondent told Dr. Gottfried he exposed himself to a female cousin when he was fifteen or sixteen years old, and sexually touched both of his sisters when he was eighteen or nineteen years old, and they were approximately eleven and fifteen years old. (Appendix, pp. 110-121).

Dr. Gottfried testified an offender's offending history is relevant to assessing future risk because prior behavior is the best predictor of future behavior, and the offending history may show patterns of behavior. She testified Respondent's criminal history and admissions to her demonstrated Respondent had a pattern of inappropriate sexual behaviors with prepubescent female children beginning when he was fifteen to sixteen years old, which included multiple offenses against prepubescent children under ten years old, fantasizing about prepubescent children and looking at sexualized images of children. Based on all the information she gathered during the evaluation, Dr. Gottfried diagnosed Respondent with pedophilic disorder, which is an intense and persistent sexual arousal to prepubescent children. (Appendix, pp. 122-126).

Dr. Gottfried then testified about the standard battery of tests the SBCL uses in evaluating all adult men and were administered to Respondent as part of the psychosexual evaluation. The tests included the Minnesota Multiphasic Personality Inventory Version 3 (MMPI), the Personality

Assessment Inventory (PAI), and the Multidimensional Inventory of Development Sex and Aggression. (MIDSA). Some of the results from these tests indicated Respondent tried to present himself in an overly positive light, he did not want to admit some minor faults that most people will admit, he was reluctant to admit having undesirable negative reactions, and he had some feelings of sexual inadequacy with adults. (Appendix, pp. 126-131).

Dr. Gottfried also used the Sexual Violence Risk-20, which is a tool to help scientifically structure professional judgment when looking for known risk factors relevant to the person being evaluated. She noted Respondent had a history of problems with sexual deviance, consistent sexual arousal to prepubescent children, sexual preoccupation during his offending, a reported history of being the victim of child abuse, offending against his victims multiple times across many years, some psychological coercion in sexual offending, and a possible negative attitude about supervision. (Appendix, pp. 131-133).

As part of her assessment of Respondent's risk to reoffend sexually, Dr. Gottfried used two actuarial risk assessment tools, the Static-99R and the Static-2002R. Respondent's score on the Static-99R was two, and his score on the Static-2002R was four, which were in the average category for reoffending when compared to other offenders. She testified these risk assessments only include offenders who have offended and then committed new detected offenses, and only approximately thirty percent of sex offenses are reported, so the Static scores potentially underestimate the actual risk of recidivism. (Appendix, pp. 133-136).

Dr. Gottfried testified about the PPG test in general, explaining what it measures and how it is administered, and describing the stimulus sets used during the test. She then testified Respondent showed clinically significant arousal on both stimulus sets to scenarios featuring sexual violence against a prepubescent female child, coercion against a prepubescent female child,

sexual violence against a pubescent or adolescent child, persuasion against a prepubescent female child, sexual activity with a male infant, and consensual sexual activity with an adult woman. Respondent's maximum arousal on the first stimulus set was to a scenario featuring sexual violence against a prepubescent female child, and his maximum arousal on the second stimulus set was to a scenario featuring coercion against a female prepubescent child. Dr. Gottfried stated the PPG test arousal pattern was consistent with Respondent's history of sexually offending against prepubescent female children. (Appendix, pp. 137-142).

Dr. Gottfried testified there are dynamic risk factors that are not considered by the Static risk assessment tools, but can be addressed in treatment. She found Respondent's dynamic risk factors include sexual arousal to children, sexual preoccupation, chronic sex offending, grooming behaviors, negative attitudes toward supervision, and poor insight into his need for management and treatment of his sexual arousal to children. She further testified Respondent told her he had not told anyone who might be a support for him in the community about his offending behavior, and he had no plans to attend sex offender treatment in the community. In Dr. Gottfried's opinion, Respondent's stated plan to prevent himself from reoffending by just not thinking about it was not a realistic plan, especially for someone with pedophilic disorder. (Appendix, pp. 142-146).

Dr. Gottfried testified to a reasonable degree of psychological certainty that Respondent has pedophilic disorder, he fantasizes about prepubescent children, and he acted on his pedophilic disorder despite intervention and prior treatment, which makes him likely to reoffend sexually against children. She opined Respondent has serious difficulty controlling his pedophilic impulses, and his risk to reoffend poses a danger to public safety. (Appendix, pp. 146-148).

Dr. Gehle's Trial Testimony

Dr. Gehle explained her evaluation protocol and testified she reviewed all the available documentation regarding Respondent. She also diagnosed Respondent with pedophilic disorder, sexually attracted to females, non-exclusive type, stating Respondent's criminal history provided sufficient information to make that diagnosis. Dr. Gehle stated she heard Dr. Gottfried's testimony regarding the PPG test results, and she was not surprised by any of the results. (Appendix, pp. 183-204).

Dr. Gehle also scored the Static-99R and Static-2002R, and placed Respondent in the average risk to reoffend category. The only dynamic risk factor she assigned to Respondent was a sexual preference for prepubescent children. She did not find he had a sexual preoccupation because "he did not seem to be dominated by his sexuality," and "it wasn't on his mind all the time." Dr. Gehle opined Respondent was not likely to reoffend sexually, and his risk was "the same as the average sex offender." (Appendix, pp. 198-209).

On cross-examination, Dr. Gehle acknowledged Respondent did not disclose to her that he exposed himself to his twelve-year-old female cousin when he was fifteen years old, or that he touched his two minor sisters inappropriately when he was approximately eighteen years old. She further acknowledged that during her interview with Respondent, she specifically asked him if he had any sexual contact with family members and he told her no, which was false. (Appendix, pp. 217-219). She stated Respondent told her he did not need any sex offender treatment, even though he had sex offender treatment when he was incarcerated on the 1997 conviction and in the community after he was released, and subsequently reoffended. He also denied he was at any risk to reoffend. (Appendix, pp. 217-223).

Verdict/Appeal

The jury found beyond a reasonable doubt that Respondent is a sexually violent predator, and Judge Henderson placed him in DMH's custody for long term control, care, and treatment. (Appendix, pp. 294-295, 396). This appeal followed.

By unpublished opinion filed on July 24, 2024, the court of appeals reversed Respondent's civil commitment pursuant to the South Carolina Sexually Violent Predator Act (SVPA), finding error in the admission of the PPG evidence and the error was not harmless. (Appendix, pp. 452). 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 Henderson. (Appendix, pp. 455). By Order filed September 20, 2024, the court of appeals denied the State's petition. (Appendix, p. 483).

ARGUMENT

The court of appeals erred in reversing Judge Henderson's admission of the PPG evidence because it applied an incorrect standard of review, and disregarded the 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.

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

The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing 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, 443 S.C. 127, 903 S.E.2d 491, 495, n. 2 (Ct. App. 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]). 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).

At the time this case was tried, there was no authority in South Carolina holding the PPG is unreliable as a matter of law. Daily, filed three years after this case was tried, was the first case in South Carolina holding that PPG evidence is unreliable and inadmissible. Indeed, in the only previously published case regarding PPG evidence, Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), the court of appeals expressly declined to rule on the issue of PPG reliability. *Id.* at 446 (“We wish to emphasize that we are not called on to review whether some hypothetical procedure would qualify as a baseline demonstration that Bilton's PPG test results were reliable. We simply hold, as noted above, that 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.” (emphasis added)).³ Thus, there was no basis for finding Judge Henderson committed an error of law.

³Significantly, Judge Henderson actually reviewed the Bilton opinion at the beginning of the pre-trial hearing. (Appendix, p. 10). Therefore, he was well aware of the PPG discussion in that case, which again, did not hold the PPG is unreliable.

Instead of appropriately analyzing the evidence presented to Judge Henderson, the court of appeals summarily reversed Judge Henderson's ruling based on case law that did not exist at the time Judge Henderson had the issue before him. The opinions issued by the court of appeals in PPG cases, both published and unpublished, reveal a consistent negative view of the PPG test regardless of the evidence presented. An appellate court's negative view of a particular scientific test or evidence is not a basis for overruling a trial court's ruling regarding the evidence's admissibility if there is evidence in the record to support that ruling. See Morris, 885 S.E.2d at 397 (appellate court defers to the trial court's exercise of discretion even when appellate judges might have decided the issue differently); Wallace, 892 S.E.2d at 312-313 (appellate court will not reverse trial court's ruling on evidentiary issue unless the trial court did not act with the discretion given to trial courts, which generally means the ruling is not supported by the evidence or is controlled by an error of law). If the court of appeals found the record indicated Judge Henderson did not meaningfully exercise the discretion given to him, it failed to acknowledge the evidence presented or conduct any analysis of it. See 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).

Dr. Emily Gottfried was qualified as an expert and has extensive experience administering and interpreting PPG test results.⁴ Dr. Gottfried testified that research conducted since 2009, including a 2019 meta-analysis of data from multiple studies with PPG test results of over 10,000 men, addressed many issues identified in earlier PPG test research, and the Diagnostic and Statistical Manual, 5th Ed., (DSM-5) recognizes use of the PPG test. (Appendix, pp. 49-50). She

⁴Dr. Gottfried's qualifications are set forth above and in the Final Brief of Respondent before the court of appeals.

further testified that research indicates the PPG reliably identifies men, like Respondent, who are sexually attracted to children, and the PPG research is ongoing and increasing, such as the 2019 meta-analysis study and published article. (Appendix, pp. 50-59).⁵

In reversing Judge Henderson, the court of appeals did not even summarize or address Dr. Gottfried's extensive pre-trial testimony, which was virtually undisputed. The only even arguable pre-trial evidence to the contrary was testimony from Dr. Gehle, who had no training or firsthand experience with the PPG, and merely based her opinions regarding the PPG on outdated articles and a 2009 practice manual. Significantly, the 2009 manual Dr. Gehle referenced had not been updated since 2009, she was not aware that the author of an article she cited as authority for the proposition that the PPG is unreliable had published a subsequent article supporting use of the PPG, and she did not know about the published article regarding the 2019 meta-analysis study. (Appendix, pp. 25-32). In short, the only thing remarkable about Dr. Gehle's pre-trial testimony regarding the PPG was her incredible lack of knowledge.

The court of appeals failed to apply the required abuse of discretion standard of review, disregarded substantial evidence in the record, and substituted its judgment for Judge Henderson's ruling that was based on extensive pre-trial testimony. Accordingly, this Court should grant certiorari review of the court of appeals opinion, reverse the court of appeals, and affirm Judge Henderson's ruling that the PPG is admissible.

⁵On cross-examination, Dr. Gottfried testified she could complete evaluations without using the PPG, but she preferred not to do evaluations without the PPG because it provided another data point for consideration. (Appendix, pp. 61-62).

B. The court of appeals' harmless error analysis mischaracterized testimony and statements before the jury and disregarded other overwhelming evidence that supported the jury's verdict.

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 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). “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.⁶

As a threshold matter, the court of appeals found prejudice in part based on its finding that Dr. Gottfried's testimony regarding the PPG “had the appearance of scientific evidence.” 2024-UP-271 at 2-3 (Appendix, pp. 452). The Bilton court, however, specifically held that the State's expert testimony regarding the PPG was a pipeline for scientific work performed by someone else, which expressly recognized that the PPG is a **scientific** test. Thus, the court of appeals' finding

⁶The State does not concede error in the admission of the PPG evidence, but as set forth above, contends there was no error. Because there was no error in admitting the PPG evidence, a harmless error analysis is not warranted. This harmless error analysis is only in response to this court's harmless error conclusion.

that Dr. Gottfried's testimony merely "had the appearance of scientific work" is contrary to the Bilton court's recognition that PPG evidence is **in fact** scientific evidence.

Further, the court of appeals' reference to the State's reliance on the PPG test during cross-examination of Respondent overlooks the fact that Respondent opened the door to that issue by testifying he had a past attraction to prepubescent girls, but "now, I do not even think about it." (Appendix, pp. 247).⁷ After the State asked Respondent about his arousal to the scenario regarding the rape of a female child, Respondent was able to give his explanation for what caused the arousal to that and other scenarios, which the jury was free to evaluate and believe or not. (Appendix, pp. 250-251).

As to the State's reference during closing argument that the PPG was "in and of itself" enough to commit Respondent, the court of appeals completely disregarded the State's argument immediately prior to the quoted statement, as well as the entirety of the State's initial closing and reply arguments. The vast majority of the State's closing arguments focused on Respondent's extensive sex offense history as established by his charges, convictions, and admissions. Prior to discussing the PPG test results during the initial closing argument, the State argued that Respondent's offending history "alone without the PPG evidence," and "with or without the PPG indicates [Respondent] is likely to re-offend." In its reply closing argument, the State again focused on Respondent's offense history and briefly referred to the PPG once as taking place on Respondent's second day at MUSC. Thus, the majority of the State's closing argument focused on Respondent's offense history as leading to the conclusion he was a risk to reoffend sexually if not confined. (Appendix, pp. 264-267, 277-281).

⁷ The State further submits the PPG cross-examination was appropriate because Judge Henderson properly ruled the PPG evidence was admissible and its probative value exceeded its prejudicial effect.

In finding admission of the PPG evidence was not harmless, the court of appeals disregarded other, and indeed overwhelming, evidence in the record that more than supported the jury's verdict, even without the PPG evidence:

- 1) Respondent had an extensive sexual offense history against prepubescent children (Appendix, pp. 104-119);
- 2) Respondent received sex offender treatment while incarcerated and, in the community, but he reoffended after treatment (Appendix, pp. 119-121);⁸
- 3) Respondent's criminal history and admissions during Dr. Gottfried's interview of him demonstrated Respondent had a pattern of inappropriate sexual behaviors with prepubescent female children beginning when he was fifteen to sixteen years old, which included multiple offenses against prepubescent children under ten years old, fantasizing about prepubescent children and looking at sexualized images of children (Appendix, pp. 122-125);
- 4) Dr. Gottfried found Respondent had multiple dynamic risk factors for reoffending, including sexual arousal to prepubescent children, sexual preoccupation, a history of chronic sex offending, psychological coercion in sex offending, and a history of negative attitude toward supervision (Appendix, pp. 132-133);
- 4) Dr. Gottfried diagnosed Respondent with pedophilic disorder, which is an intense and persistent sexual arousal to prepubescent children (Appendix, pp. 121-122);
- 4) Significantly, Dr. Gehle also diagnosed Respondent with pedophilic disorder, sexually attracted to females, non-exclusive type, stating Respondent's criminal history provided sufficient information to make that diagnosis, and she testified she was not surprised by any of Respondent's PPG test results because they were consistent with the factors she considered in reaching her diagnosis (Appendix, pp. 193-194);
- 5) On cross-examination, Dr. Gehle acknowledged Respondent did not tell her he had exposed himself to his twelve-year-old female cousin when he was fifteen years old, or that he touched his two minor sisters inappropriately when he was approximately eighteen years old, even though she specifically asked him during the interview if he had any sexual contact with family members and he told her no, which she admitted was a lie. (Appendix, pp. 217-219);

⁸Dr. Gottfried's trial testimony regarding Respondent's offenses, her evaluation protocol and diagnostic process is set forth in detail above and in the Final Brief of Respondent before the court of appeals.

6) Respondent also told Dr. Gehle he did not need any sex offender treatment, even though he reoffended after having sex offender treatment while incarcerated on the 1997 conviction and in the community after he was released, and he denied he was at any risk to reoffend. (Appendix, pp. 221-222).

Thus, in terms of the SVPA statutory elements, both experts found Respondent has a mental abnormality that is causally connected to his sexual offending, but they disagreed on whether Respondent was a risk to reoffend against children in the future. Dr. Gottfried's opinion regarding Respondent's risk to reoffend was based on a comprehensive, multi-faceted psychosexual evaluation, while Dr. Gehle's opinion on that issue was essentially based on Respondent's statements during the interview, even though he lied to her about some critical aspects of his history.

The fact Respondent was convicted in 1997 of sexually offending against prepubescent children, received sex offender treatment while incarcerated for that conviction and in the community after his release, and then reoffended against prepubescent children in 2015, clearly indicated a sustained deviant interest in prepubescent children. During his evaluations with both Dr. Gehle and Dr. Gottfried, however, Respondent claimed he was no longer sexually aroused by prepubescent children, even stating there was no risk he would reoffend. Dr. Gehle accepted his claim at face value, but Dr. Gottfried did not. When Dr. Gottfried confronted Respondent with his test results, he admitted sexually molesting three family members (a cousin and his two sisters), which had never been reported.⁹

⁹Dr. Gehle did not challenge Respondent about his statements denying any unreported sex offenses against family members, even in light of his documented offenses against family members. The jury was free to consider that fact in determining the credibility of Dr. Gehle's opinions.

The court of appeals cited limited quotes from Dr. Gottfried's PPG trial testimony in support of its harmless error conclusion, including her description of the PPG as "an objective physiological measure of male sexual arousal," "the gol[d] standard of looking at adult males sexual arousal," and "a strong predictor or risk factor for future sexual offending." When those quotes are considered in context, however, Dr. Gottfried's statements were based on the research she testified about in the pre-trial hearing.¹⁰ Further, her statement regarding the PPG as "a strong predictor or risk factor for future sexual offending" was immediately preceded by "the research suggests that having sexual interest in children as measured by [the PPG]," tying the statement directly to research in the field, which the court of appeals overlooked.

Dr. Gottfried's entire PPG trial testimony was at most 5.5 pages (Appendix, pp. 137-142), or 7% of her direct testimony, with the remaining 93% of her direct testimony relating to Respondent's sex offense history, test results other than the PPG, Respondent's admissions to her, and her ultimate opinions. (Appendix, pp. 97-148). The State's reference to the strength of the PPG test evidence during closing argument did not ask the jury to ignore all other evidence in the case, but specifically argued that the jury could commit Respondent "with or without" the PPG evidence.

The jury heard from two experts who agreed on Respondent's mental abnormality of pedophilia and his sexual preference for prepubescent children, and then testified about the basis

¹⁰Judge Henderson ruled that testimony regarding the PPG's reliability would not be allowed before the jury, which precluded Dr. Gottfried's testimony about the extensive research, peer review, publications and conference presentations finding that the PPG is reliable. Her statements that the PPG is "objective" and the "gold standard" for measuring male sexual arousal were based on the evidence that was presented during the pre-trial hearing regarding the PPG reliability.

for the differences in their opinions regarding his risk to reoffend. The jury was free to accept or reject either expert's opinion on the issue of Respondent's risk to reoffend sexually.

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 has a sexual preference for prepubescent children (undisputed), and that Dr. Gehle's assessment of Respondent's risk to reoffend was extremely lacking. Significantly, the jury also heard Respondent's own testimony and was able to judge his credibility, which was a primary factor in Dr. Gehle's risk analysis. In light of that evidence, any error in admitting the PPG evidence was harmless beyond any reasonable doubt.

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.

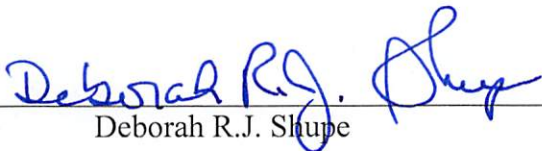
CONCLUSION

Based on the foregoing, and the matter set forth in the Final Brief of Respondent and the 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 Henderson's ruling regarding admissibility of the PPG testimony that was amply supported by the evidence, and reinstate 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.

Respectfully submitted,

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