

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Anderson County
The Honorable R. Scott Sprouse, Circuit Court Judge
Court of Appeals Appellate Case No. 2021-000733
Opinion No. 2024-UP-270

IN THE MATTER OF THE CARE AND TREATMENT
OF JAMES LEWIS WILLIFORD,

RESPONDENT.

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

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INDEX

Certificate of Counsel 1

Question Presented..... 1

Statement of the Case..... 1

Statement of Facts 3

Argument 13

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

Conclusion.....20

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 Sprouse's admission of the PPG evidence because it applied an incorrect standard of review, and disregarded Judge Sprouse'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 Sprouse'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 Sprouse after a full evidentiary hearing. The court of appeals decided the case without

oral argument and overlooked 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 premised on Matter of Daily, ___ S.C. ___, 905 S.E.2d 310 (Ct. App. 2024), which was the first published opinion in South Carolina expressly finding the PPG is unreliable and evidence regarding it is inadmissible. The State has filed a Petition for Writ of Certiorari to the Court of Appeals in that case. As in Daily, the court of appeals reached its conclusion regarding the reliability of the PPG test 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 February 2003, Respondent James L. Williford pled guilty to one count of assault and battery with intent to kill and two counts of criminal sexual conduct, first degree, arising from the sexual assaults of two adult female victims, and was sentenced to twenty years' incarceration. Prior to Respondent's release from incarceration, Petitioner State of South Carolina initiated a civil action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Respondent's civil commitment for long term control, care, and treatment as a sexually violent predator. The matter was called for a bench trial on June 14, 2021, before the Honorable R. Scott Sprouse, Circuit Court Judge.

Prior to trial, Respondent moved to exclude all testimony regarding a PPG administered to

him during an evaluation by Emily Gottfried, Ph.D., of the Medical University of South Carolina (MUSC). Respondent argued there was no standardization related to the PPG, there was no adequate publication or peer review, there were no quality controls in place to ensure reliability, and there was no margin of error that could be measured. In response, the State proffered testimony from Dr. Gottfried addressing each of these concerns. (Appendix, pp. 24-33; 256-269).

Dr. Gottfried's Pre-Trial Testimony

Dr. Gottfried was qualified as an expert in forensic psychology by stipulation. She testified she is an Assistant Professor of Psychiatry and Behavioral Sciences at MUSC and serves as the director of MUSC's Sexual Behaviors Clinic and Lab (SBCL).¹ Her duties include conducting forensic evaluations, overseeing treatment, and teaching and supervising medical students, psychiatry residents, forensic fellows, and an assortment of students. (Appendix, p.36).

Dr. Gottfried became involved in the instant case after the State requested that the SBCL conduct an independent pre-commitment evaluation of Respondent. Consistent with the best practices in the field, the SBCL evaluation includes reviewing data from multiple sources and multiple methods of testing to look for general psychopathologies, symptoms of mental illnesses, personality disorders, and sexual arousal. They then assess the data gathered in multiple ways. The standard protocol used by the SCBL consists of 1) a thorough review of all available collateral records; 2) an assessment of general psychopathology, personality functions, substance use, sexual functions and sexual history; 3) an assessment of sexual arousal; 4) scoring several risk instruments that look at risk factors from scientific literature; and 5) conducting an extensive clinical interview with the person. (Appendix, p. 37).

¹Dr. Gottfried's credentials, including those related to the PPG specifically, are set forth more fully at page 6 of the Final Brief of Respondent before the court of appeals.

Dr. Gottfried testified she is trained on the PPG and is a licensed and certified clinical analyst. The SBCL has been certified by Limestone Technologies (which manufactures the PPG machine used at the SBCL) as both a clinical and research laboratory. She stated the research certification is the highest level possible. (Appendix, pp. 46-48).

The PPG is part of the SBCL's standard protocol because it provides another data point, and sexual arousal due to nonconsensual or abusive stimuli provides a strong predictor of future sexual recidivism. The research also shows the individuals being evaluated pursuant to a sexual predator act have reasonable motivation to not be very forthcoming about their sexual arousal, and the PPG provides a data point regarding sexual arousal patterns, which the SBCL uses in combination with the person's self-report and the results of other tests. (Appendix, pp. 38-39).

The PPG has been peer reviewed and approximately 100 publications specific to abusive or illegal sexual behaviors have discussed use of the PPG. The PPG is also discussed in the general sexual behavior literature, looking at things like erectile dysfunction, sexual health, and wellness. Dr. Gottfried testified a peer review paper published on June 8, 2021, in the general sexual behavior literature section of Nature, which "is a really, really high impact factor journal," found the PPG "may be useful as a non-invasive potential technique to evaluate penile erection in men's health," and it "can actually be applied to clinical penile hardness and erectile function assessments." (Appendix, pp.39-40).

Dr. Gottfried testified the SBCL has multiple quality controls for the PPG testing. Everyone in the SBCL is certified by Limestone to do their parts of the test, including administration of the test and interpretation of the data. They use a new gauge for each test, and the gauge is calibrated on a five-step program before a test can even begin. They also use countermeasures to make sure the test administration is reliable, and each test is conducted in the

same way for every examinee. They do a sound check and constantly monitor the temperature and humidity in the test room. There are standardized instructions in a ten page document with a numbered checklist that the person administering the test goes over with each examinee. (Appendix, pp. 42-43).

The equipment is also set up to detect when the examinee is trying to manipulate the results of the test. The examinee may move around or squirm in the seat, try to have an erection to something he is not aroused to by flexing, or hold his breath. One countermeasure is the pad the examinee sits on during the test picks up movements, and another is a respiration strap which indicates any irregularities in breathing. There is also a keypad on the examinee's chair, and the examinee is instructed to press it if a scenario becomes either violent or sexual, which demonstrates whether the examinee is actually paying attention during the test. The examinee may be asked to briefly describe a scenario, which is also designed to measure the examinee's attention to the test. (Appendix, pp. 43-44).

The SBCL uses a very conservative cut score (change in penile circumference) to determine whether results are significant or not significant, in part to avoid false positive results.² Dr. Gottfried testified using a high cut score may lead to missing some people (false negatives), but in high stakes evaluations, such as those pursuant to the SVPA, they do not want to say an examinee is aroused by something when he is not. She also reiterated the PPG is only one data point considered in SBCL evaluations. (Appendix, pp. 44-45, 55-57).

²Dr. Gottfried testified the cut scores are an area the Committee on Standardization is considering, and different scores may be used depending on what the PPG is being used for. Another standardization issue is the fact that other countries are allowed to use child pornography in a PPG test, but the United States does not use child pornography. Through the Committee's work, other countries have started using some of the stimuli currently used throughout the U.S., but they continue to use child pornography as well. (Appendix, pp. 45-46).

Dr. Gottfried testified the Association for the Treatment of Sexual Abusers (ATSA) practice guidelines for assessment, treatment and management of male sex offenders, published in 2014, recognize the PPG as a useful tool in both assessment and treatment of adult men because it provides a means to obtain objective behavioral data that may not be readily established through other assessment means, and to explore the reliability of an examinee's self-report. The guidelines also stress the PPG should not be used as the sole criterion for any decisions regarding an examinee, and it would be unethical to use it as the sole data point or to say that a person was guilty of a crime. (Appendix, pp .46-48).

Dr. Gottfried stated the Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed. (DSM-5), also recognizes the PPG can be used to compare the person's normal sexual interests to paraphilic interests. The DSM-5 further states the PPG is "[t]he most thoroughly researched and longest used" psychophysiological measure of sexual interests, "although the sensitivity and specificity of diagnosis may vary from one site to another." (Appendix, pp. 48-50).

Dr. Gottfried testified that a book published in 2019, Sexually Violent Predators Clinical Science Handbook, has a chapter (Chapter 15) entitled "The Use of Penile Plethysmography in SVP Assessment and Treatment Decision Making," which states the use of the PPG is important in both evaluating and treating sex offenders being considered for civil commitment under sexual predator laws because research has found the identification of deviant sexual arousal is a significant predictor of sexual recidivism. She further testified the PPG is generally accepted in the mental health community as evidenced by the literature from ATSA, the DSM-V, FDA approval of the Limestone hardware system, which the SBCL uses, and recognition of the PPG as a medical test by the FDA, Medicare, and Blue Cross/Blue Shield. (Appendix, pp. 51-53).

Dr. Gottfried acknowledged there are criticisms of the PPG regarding standardization,

offenders who do not show expected arousal patterns, and consistency with self-reported arousal patterns. She testified that the 2019 book included data from fifty-three studies and almost 9500 men, and it addressed many of the standardization issues, including the type of stimuli used, interpretations using standardized scores, and whether predictive effect sizes were strong or stronger than most risk factors for sexual recidivism. (Appendix, pp. 53-55).

The SBCL uses two stimuli sets, the Marshall set, which is older and consists of audio only, and the Real Child Voices (RCV) set. RCV, which consists of images plus audio. The RCV set is standard on all Limestone Technology PPG hardware, and at least fifty labs across the country use it, including sexual predator programs in Minnesota, California, New York, Illinois, and Missouri. Dr. Gottfried testified the 2019 meta-analysis found the slide plus audio was the preferred and most valid way to administer a PPG, and the RCV set has been studied and been the subject of peer reviewed presentations at multiple scientific conferences. (Appendix, pp. 57-61).

The SBCL saw Respondent twice in February 2020 and completed the evaluation in April 2020 after COVID related delays. Respondent consented to the evaluation, including the PPG. On psychological tests, Respondent's results indicated defensiveness or deception, he denied all his sexual offenses, including the ones he pled guilty to, and denied any sexual arousal. He also provided inconsistent information between the SBCL and Department of Mental Health (DMH) evaluations, as well as between the days of the SBCL evaluation. (Appendix, pp. 62-64).

On cross-examination, Dr. Gottfried testified there were multiple studies looking at the specificity and sensitivity of the PPG, which dealt with false negatives and false positives and established the margin of error for the PPG. She stated any test can theoretically be manipulated, and the SBCL uses a conservative cut score to minimize the possibility of false positive results. (Appendix, pp. 76-80).

Judge Sprouse's Findings and Conclusion Regarding Admissibility

Judge Sprouse found the PPG evidence was admissible under the factors outlined for scientific evidence in case law. Specifically, Judge Sprouse found Dr. Gottfried's testimony established the PPG was subject to peer review, the subject of numerous publications, and recognized in the DSM-5. He further found the PPG is used in over fifty labs in various parts of the country. He acknowledged there are different standards between the United States and other countries, but found there is standard application in the United States. (Appendix, pp. 92-94).

As to quality control procedures, Judge Sprouse found the SBCL uses various methods to determine an appropriate baseline for the test, uses a conservative threshold of arousal, and Dr. Gottfried gave a detailed explanation of how the baseline is established and the test procedure. He further found the testimony indicated the RCV set is standard and provided by the manufacturer, the SBCL uses standard instructions provided by the manufacturer, and there are methods in place to prevent test manipulation. He also noted Dr. Gottfried testified the PPG is only one data point considered, and it does not preclude other considerations. (Appendix, pp. 94-95).

Finally, Judge Sprouse found that many of Respondent's arguments regarding the PPG went to the weight of the testimony, not admissibility. He noted the ruling was without prejudice to Respondent's ability to challenge the weight and sufficiency of the evidence. (Appendix, p. 95).

Dr. Gottfried's Trial Testimony

During trial, Dr. Gottfried was qualified as an expert in forensic psychology, and she testified regarding Respondent's evaluation process, including the tests administered and what she considered in reaching her conclusions. She reviewed Respondent's criminal history, including

his qualifying convictions under the SVPA, and stated his scores on actuarial risk assessment tools were in the well above average risk to reoffend category. In addition, Respondent exhibited several dynamic risk factors for reoffending not considered in the actuarial risk assessments. (Appendix, pp. 95-137).

Dr. Gottfried diagnosed Respondent with antisocial personality disorder, narcissistic personality disorder, and paraphilic coercive disorder. She testified that the combination of Respondent's personality disorders and paraphilic disorder "significantly increase his risk for future sexual violence." She opined to a reasonable degree of psychological certainty that Respondent has serious difficulty controlling his propensity to commit sexually violent offenses and poses a danger to the health and safety of others if not committed for long term control, care, and treatment. (Appendix, pp. 137-147).

Respondent's Evidence

Respondent presented testimony from Rozanna Tross, Psy.D., who evaluated him as the court appointed evaluator when she worked for DMH. She ascribed Respondent's criminal behavior to his early lifestyle and upbringing, rather than a personality disorder or mental abnormality. She concurred with Dr. Gottfried's testimony that Respondent scored in the well above average risk to reoffend category on the actuarial risk assessment tools, as well as Respondent's defensiveness, his minimization of his level of responsibility, and his dynamic risk factors. Dr. Tross opined Respondent did not have any personality disorders or mental abnormalities that would qualify him for commitment under the SVPA. (Appendix, pp. 173-230).

Verdict/Appeal

Judge Sprouse found the State had proven beyond a reasonable doubt that Respondent is a sexually violent predator and ordered that he be committed to DMH for long term control, care,

and treatment. (Appendix, p. 286). This appeal followed.

By unpublished opinion filed July 24, 2024, a court of appeals panel, without oral argument, reversed Respondent's commitment, finding Judge Sprouse erred in allowing the PPG testimony because the PPG is unreliable and that the error was not harmless. (Appendix, pp. 330). 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 Sprouse, and, by Order filed September 20, 2024, the court of appeals denied the State's petition. (Appendix, pp. 349).

ARGUMENT

The court of appeals erred in reversing Judge Sprouse's admission of the PPG evidence because it applied an incorrect standard of review, and disregarded Judge Sprouse'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 contended Judge Sprouse erred in admitting Dr. Gottfried's testimony regarding the PPG test conducted as part of her comprehensive psychosexual 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 disregarded 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 factfinder 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 Sprouse'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 of appeals did not find any of Judge Sprouse's findings and conclusions lacked evidentiary support, but in a conclusory fashion, overlooked the extensive evidence before Judge Sprouse regarding the reliability of the PPG, particularly in relation to the Jones/Council factors. The only apparent basis for an error of law was the court of appeals' previous decision in Daily, which the State contends was itself erroneous for many of the same reasons the decision in this case is erroneous.

Based on Dr. Gottfried's testimony, Judge Sprouse found:

1) the PPG was subject to peer review and publications

Dr Gottfried testified the PPG has been studied and peer reviewed multiple times, there are over 100 published articles about it, and it has been discussed in the general health literature as well. (Appendix, pp. 39-40);

2) the DSM-5 recognized use of the PPG

Dr. Gottfried testified the DSM-5 recognizes the PPG can be used to compare the person's normal sexual interests to paraphilic interests; in

addition, it is recognized in a 2019 clinical scientific handbook for sexual predator evaluations, it is included in a national organization's guidelines for assessment, treatment and management of adult male sex offenders, and it is general accepted in the mental and general health communities. (Appendix, pp. 48-43, 52-53);

3) the PPG is used in over fifty labs in various parts of the country

Dr. Gottfried testified at least fifty labs in the United States, and some international labs, use the Limestone PPG system, some sexually violent predator treatment programs use the PPG, and there is standard application of the PPG in the United States (Appendix, p. 57);

4) the SBCL uses various methods to determine an appropriate baseline, uses a conservative threshold of arousal, uses SCBL uses standard instructions provided by the PPG system manufacturer, and has methods in place to prevent test manipulation

Dr. Gottfried testified about the multiple quality control measures used in the SCBL, including training and certification by Limestone for administering and interpreting the test, controlling the temperature and humidity controls in the test room, and using standard instructions in every PPG test, and it uses a conservative cut score for determining significant arousals (double the cut score recommended by the research literature. (Appendix, pp. 41-46);

5) the PPG is only one data point Dr. Gottfried considers in her evaluations, and it does not preclude other considerations

Dr Gottfried testified the PPG should never be the sole data point for purposes of diagnosis and risk assessment, and it would be unethical to use it that way; the SBCL protocol includes multiple psychological tests, review of all records related to the person being evaluated, actuarial risk assessments, and a structured interview. (Appendix, pp. 36-37, 45-48).

Based on those findings, Judge Sprouse concluded the PPG test is reliable, evidence regarding Respondent's PPG test was admissible, and Respondent could challenge the weight and sufficiency of the PPG evidence. (Appendix, pp. 92-95).

It is clear from the record that Judge Sprouse 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. Rather than fully analyze the evidence and Judge Sprouse's findings, the court of appeals summarily concluded the PPG test did not meet the requirements for admissibility of scientific evidence, citing a lack of standardization, adequate publication and peer review, quality control procedures and calculation of margin of error. These cited reasons indicate the court of appeals disregarded much of Dr. Gottfried's undisputed testimony and Judge Sprouse's specific findings regarding standardization, the extensive peer review of, and publications about, the PPG, the quality control measures established by the PPG manufacturer that are used in the MUSC's SBCL, as well as at least fifty labs across the United States, and the direct testimony regarding the margin of error calculations in the published research.

Instead of applying the appropriate abuse of discretion standard of review, the court of appeals engaged in a *de novo* review and based on the Daily opinion, and the court of appeals' recent, consistent negative view of the PPG test in general, it substituted its judgment for Judge Sprouse's without finding abuse of discretion as to any of Judge Sprouse's findings or conclusions. An appellate court's negative view of 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*, 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 support by the evidence or is controlled by an error of law); 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).

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 Sprouse's well-reasoned ruling. Accordingly, the Court should grant certiorari to review the court of appeals opinion and affirm Judge Sprouse's appropriate, careful and meaningful exercise of his discretion.

B. The court of appeals' harmless error analysis mischaracterized Dr. Gottfried's testimony and overlooked other overwhelming evidence that supported Judge Sprouse conclusion that Respondent is a sexually violent predator as defined by the SVPA.

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.³

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).

"It is well-established that it is a near insurmountable burden for a defendant to prove prejudice in the context of a bench trial as a judge is presumed to disregard prejudicial or

³The 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.

inadmissible evidence.” State v. Inman, 395 S.C. 539, 720 S.E.2d 31, 45 (2011) (*citing* People v. Jackson, 949 N.E.2d 215, 229 [2011])[the danger of prejudice is lessened in a bench trial]). While the PPG evidence in this case was prejudicial to Respondent, that prejudice did not invalidate Judge Sprouse’s ultimate verdict.

As with its PPG analysis, the court of appeals set forth the correct harmless error standard, then failed to apply it to this bench trial. Rather than considering the PPG testimony in context and reviewing the case before Judge Sprouse as a whole, the court of appeals simply concluded the PPG evidence may have contributed to Judge Sprouse’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 disregarded other, and indeed overwhelming, evidence in the record that more than supported Judge Sprouse’s verdict, even without any of the PPG evidence. Dr. Gottfried testified about Respondent’s evaluation process, including the full battery of psychological tests administered, and what she considered in reaching her conclusions. She reviewed Respondent’s criminal history, including his qualifying convictions under the SVPA, and stated his scores on actuarial risk assessment tools were in the well above average risk to reoffend category. In addition, Respondent exhibited several dynamic risk factors for reoffending not considered in the actuarial risk assessments. (Appendix, pp. 95-137).

Dr. Gottfried’s testimony regarding Respondent’s PPG test results was limited, and she stated the results were consistent with the pattern of Respondent’s reported sex offenses. (Appendix, pp. 125-126). Her entire trial testimony, including cross-examination and re-direct, is seventy-six pages (Appendix, pp. 96-172), and the PPG test result testimony is one and one-half pages, or 2% of her entire testimony. Contrary to the court of appeals’ finding that Dr. Gottfried’s

testified extensively about the PPG test results, this demonstrates Dr. Gottfried did not “emphasize” the importance of Respondent’s PPG test results, and as she stated, the PPG was only one data point she considered in the course of her comprehensive evaluation of Respondent.

Dr. Gottfried diagnosed Respondent with antisocial personality disorder, narcissistic personality disorder, and paraphilic coercive disorder. She testified that the paraphilia diagnosis was premised on the pattern of coercion and force in Respondent’s sex offenses, and when that was considered with the PPG results and Respondent’s personality characteristics, his paraphilia significantly increases his risk for future sexual violence. (Appendix, pp. 137-147).

Respondent’s expert ascribed Respondent’s criminal behavior to his early lifestyle and upbringing rather than a personality disorder or mental abnormality. She concurred with Dr. Gottfried’s testimony that Respondent scored in the well above average risk to reoffend category on the actuarial risk assessment tools, as well as that Respondent was defensive, he minimized his level of responsibility, and he had multiple dynamic risk factors, but she opined he did not have any personality disorders or mental abnormalities that would qualify him for commitment under the SVPA. (Appendix, pp.173-230).

Judge Sprouse heard from two experts. Dr. Gottfried performed a thorough and multi-faceted psychosexual evaluation. Dr. Tross performed a less thorough evaluation, accepted as true Respondent’s self-serving statements to her about how he had changed, then blamed Respondent’s significant history of sexual offending on his childhood rather than a mental abnormality or personality disorder. Dr. Tross agreed Respondent was at high risk to reoffend sexually according to well-established actuarial risk assessment tools, one of which she scored one point higher than Dr. Gottfried’s score. On cross-examination, she also agreed, albeit reluctantly, that there was “some evidence initially that could suggest” Respondent had an interest in non-consensual sexual

activity. (Appendix, pp. 173-230). Thus, the only true disagreement between the experts was whether Respondent has a mental abnormality or personality disorder at all.

The State briefly referenced the PPG test during closing argument (Appendix, p. 234), focusing instead on the thoroughness of Dr. Gottfried's evaluation, the pattern of coercion and force established by Respondent's sexual offenses, Respondent's statements to Dr. Gottfried during the evaluation, the issues the two experts agreed on, and the basis for Dr. Tross' opinion Respondent did not have either a mental abnormality or personality disorder. (Appendix, pp. 229-236). More significantly, Respondent's counsel argued in closing that "the big thing, Judge, in this case is whether or not there is a mental abnormality or personality disorder to begin with." (Appendix, p. 237).

Judge Sprouse was free to accept or reject either expert's opinion on the issue of whether Respondent has a mental abnormality or personality disorder that is causally linked to his sexual offending and his propensity to reoffend sexually is to such a degree as to constitute a danger to the public. Even without the PPG evidence, the differences in thoroughness and methodology between the evaluations were stark, and Judge Sprouse could determine the experts' respective credibility and weigh their opinions accordingly. Further, the PPG results evidence was arguably cumulative to the undisputed evidence regarding the facts of Respondent's sex offense history, which was the basis for Dr. Gottfried's paraphilia diagnosis.

The court of appeals' reference to a quote from Dr. Gottfried's pre-trial testimony stating she could not do an evaluation if she could not use the PPG blurs the substance of her entire statement. The court of appeals correctly stated the reason Dr. Gottfried gave for not doing an evaluation without the PPG was that it was part of the standard protocol for the SBCL, she would not take it out of that protocol, and she would still administer it and use it as a data point if she

could not testify about the results in court. (Appendix, p. 65). Contrary to the court of appeals' implication that Dr. Gottfried's statements indicated the PPG was a primary basis for her opinions in this case, however, the substance of her statements was that she would not do an evaluation without the PPG, rather than that she could not do an evaluation without it. Further, the court of appeals did not indicate how those limited statements during the pre-trial hearing obviated, or even outweighed, all the other evidence presented to Judge Sprouse during the trial regarding the basis for Dr. Gottfried's opinions.

The evidence about Respondent's PPG test results was a minimal part of Dr. Gottfried's testimony. Rather than consider that minimal testimony in context with the other evidence presented as the basis for Dr. Gottfried's opinions, and give credence to Judge Sprouse's ability to sort through all the evidence presented, the court of appeals summarily concluded the error in admitting the PPG evidence was not harmless beyond a 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 properly considered or analyzed any of the other undisputed evidence before Judge Sprouse. 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 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 Sprouse's findings and conclusions regarding admissibility of the PPG testimony that were amply supported by the evidence, and reinstate Judge Sprouse's well-supported 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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