

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal from Anderson County  
Honorable R. Scott Sprouse, Circuit Court Judge

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Opinion No. 2024-UP-270 (S.C. Ct. App. Filed July 24, 2024)  
Lower Court Case No. 2019-CP-04-01308  
Court of Appeals Appellate Case No. 2021-000733

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IN THE MATTER OF THE CARE AND  
TREATMENT OF JAMES L. WILLIFORD,

RESPONDENT.

APPELLATE CASE NO. 2024-001782

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RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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**Nov 05 2024**

S.C. SUPREME COURT

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**PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI**

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?

**RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE**

Did the Court of Appeals properly hold the PPG test was not reliable as required by Rule 702, SCRE and the trial court's error in admitting PPG results contributed to the result of the bench trial?

## STATEMENT OF THE CASE

The Attorney General initiated sexual violent predator commitment proceedings against respondent, James L. Williford, in Anderson County. On June 14, 2021, a bench trial was held before the Honorable R. Scott Sprouse. App. 4. Christopher Runyan and Suzanne Shaw represented the state. App. 5. Don Thompson represented Mr. Williford. App. 5. By written order Judge Sprouse found Mr. Williford was a sexually violent predator and ordered him committed. App. 286.

James L. Williford, through counsel, appealed the commitment under the Sexually Violent Predatory Act (the SVP Act).<sup>1</sup>

On July 24, 2024, The Court of Appeals reversed Mr. Williford's conviction and remanded his case. App. 330-33. Pursuant to Rule 221(a), SCACR, the state filed a petition for rehearing on August 12, 2024. App. 334-48. Based on a request from the Court of Appeals, respondent filed a return to the petition for rehearing on August 23, 2024. The Court of Appeals denied the state's petition for rehearing by order filed on September 20, 2024. App. 349. On October 21, 2024, the state filed a petition for writ of certiorari with this Court.

This return to the petition for writ of certiorari follows.

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<sup>1</sup> S.C. Code Ann. §§ 44-48-10 to 44-48-180 (2018 & Supp. 2023).

## 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 of a manifest abuse of discretion accompanied by probable prejudice.” *Matter of Bilton*, 432 S.C. 157, 161-62, 851 S.E.2d 442, 444 (Ct. App. 2020), reh’g denied (Dec. 22, 2020) (quoting *State v. Commander*, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417 (2011)) (internal quotation marks omitted). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.* at 162, 851 S.E.2d at 444 (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted).

## ARGUMENT

The Court of Appeals properly held the PPG test was not reliable as required by Rule 702, SCRE and the trial court's error in admitting PPG results contributed to the result of the bench trial.

### **Relevant facts**

Before trial, defense counsel made a motion to suppress testimony related to the PPG test and results because the test did not meet the “requirements of admissibility for scientific evidence.” App. 24-31; 251. Defense counsel asserted testimony about the PPG test and its results were inadmissible because the test: (1) lacked standardization; (2) had not been adequately published or peer reviewed; (3) had no quality control procedures; and (4) did not calculate a margin of error. App. 25-27. Defense counsel also argued that the prejudicial effect of the PPG test evidence far outweighed any potential probative value. App. 31, ll. 1-5

The state proffered testimony regarding the PPG test through its expert Dr. Emily Gottfried from The Medical University of South Carolina (MUSC).<sup>2</sup> App. 33, l. 1—34, l.2. Dr. Gottfried got involved in this case when the Attorney General's office asked her for a *second* opinion in the pre-commitment evaluation of Mr. Williford. App. 98, ll. 1-10. Dr. Gottfried explained the PPG test is a physiological test given to an individual to test arousal. She explained the examinee sits in a private room and places a gauge, a thin flexible stretchy band, on his penis. Then the examinee is presented with a series, a trial, of audio or visual stimuli of various sexual situations. The test measures the changes of circumference of the penis in response to the stimuli. App. 41, ll. 3-17. Gottfried insisted throughout her testimony the PPG test was just one data point to consider, but she also stated, “sexual arousals due to

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<sup>2</sup> Gottfried's proffered testimony about the PPG test was incorporated by reference because this was a bench trial and the court had already heard the testimony. App. 96, ll. 1-14.

nonconsensual or abusive stimuli is a strong predictor of future sexual recidivism.” App. 38, ll. 10-13.

Gottfried testified her lab used two different stimulus sets. One, developed by Bill Marshall, called the Marshall Test. The Marshall test set is audio descriptions of sexual stimuli and neutral stimuli. The other test set developed by Bill Burke, called Real Child Voices (RCV). RCV consisted of visual slides and audio which included children’s voices and women’s voices. App. 57-58.

Gottfried admitted there were problems with standardization of the PPG test because it was used for different things. She acknowledged it was hard to know what every lab that conducts this test does. App. 45, ll. 8-10; 76, ll. 1-5. Gottfried also recognized some literature said that offenders do not show expected arousal patterns on the PPG. App. 53, ll. 19-22. She testified she was working with a group of individuals to address some of the issues with standardization. App. 46, 3-7; 53, ll. 13-18. Gottfried acknowledged that there were ways to manipulate the test to show false positives and false negatives. App. 76-77.

Gottfried testified she published articles specific to the PPG test and she presented at conferences about it. App. 35-36. She contended it had been peer reviewed and there were “at least a hundred publications” about the PPG test specific to abusive or illegal sexual behaviors. App. 39, ll. 12-23. The state’s attorney asked Gottfried to read two sections from the Diagnostic Statistical Manual of Mental Disorders<sup>3</sup> where the PPG test was mentioned. App. 49-50.

Limestone Technology is a Canadian Company that makes the hardware used in the PPG test and some of the software used in the test. App. 72, ll. 2-3. Gottfried testified she and the technicians at her lab were trained in the PPG. Gottfried said she was certified in the PPG test as

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<sup>3</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5<sup>th</sup> ed. 2013).

a “licensed technologies certified clinical analyst.” She also stated her clinic and lab were certified by Limestone Technologies as both a clinical and a research laboratory. App. 37-38; 42, ll. 15-20. Gottfried testified that each examinee is given a new gauge which is calibrated on a five-step program before the test begins. App. 42, ll. 21-23. The countermeasures Gottfried described using were as follows: (1) a soundcheck, (2) monitoring the temperature and humidity of the room, and (3) standardized instructions. App. 43, ll. 2-10.

Gottfried testified there are twenty-seven trials in the Marshall set and twenty-four in the RCV set. Both were given to Mr. Williford. She said that they do not conduct multiple PPG tests on an individual. App. 78, ll. 6-10. Gottfried explained the lab at MUSC used a “very conservative cut score,” which is a “clinical decision made about what is significant and what isn’t significant.” App. 44, ll. 12-17. When asked if there had ever been a margin of error calculated on the PPG test, Gottfried answered, specificity and sensitivity account for the margin of error. App. 78. Gottfried explained sensitivity is a “true positive” someone who is aroused by certain stimuli and the PPG test reflects they are aroused by that same stimulus. Specificity is a “true negative,” where a person is not aroused by a specific stimulus and the PPG test shows that they are not aroused by those stimuli. App. 55, l. 17-56, l. 1.

Gottfried emphasized the PPG test should not be used as the sole criterion for any decisions and said it would be unethical to test someone who was not charged or convicted of a sexual offense. She stated the PPG test does not reflect anything other than what the examinee is aroused by on the day of the test. App. 47-48.

The court denied defense counsel’s motion to suppress finding the PPG testimony would assist the court as the trier of fact in understanding the evidence, which involved scientific issues outside the realm of the ordinary knowledge of a lay person. App. 92, l. 22—93, l. 4. The court

found that the PPG test had been subject to peer review and “numerous publications.” App. 93, ll. 11-19. The court found that, although the testimony indicated there were different standards in some countries, based on Gottfried’s testimony, there was a standard application of the test in the United States. App. 93, l. 20—94, l. 4. The court found the standard for quality control procedures was met. App. 94, ll. 5-13. Lastly, the court found that the standard for “consistency and method with recognized scientific laws and procedures,” was met where Gottfried used the standard instructions provided by the manufacturer of the test and testified that there were methods to prevent manipulation of the test. App. 94, l. 14-92.

Mr. Williford was given both the Marshall stimulus set and the RCV stimulus set. App. 62, ll. 5-10; 125, ll. 16-18. Gottfried testified the lab began tailoring the RCV set to the “offending pattern” of the examinee, but Mr. Williford’s examination was not tailored. App. 59, ll. 1-10. Gottfried testified that Mr. Williford showed “clinically significant arousal” to trials involving coercion or sexual violence of an adult woman; coercion of a female child; violence against a female child or infant; consensual sexual behavior with an adult woman, and persuasion of a male child. App. 125, l. 25—126, l. 6. Gottfried testified data from the PPG test factored into her ultimate opinion regarding Mr. Williford. App. 124, l. 24—125, l. 1.

## **Discussion**

The Court of Appeals correctly found the trial court abused its discretion in admitting Dr. Gottfried’s testimony about the PPG test and results from the test given to Williford because the PPG evidence lacked scientific reliability and validity. *See generally Matter of Bilton*, 432 S.C. 157, 162, 851 S.E.2d 442, 444 (2020) (Stating “[t]he test is controversial and has been criticized for a lack of standardization and for being subject to manipulation.”). In its opinion the Court of Appeals cited, *In re Gonzalez*, which states “[a]n abuse of discretion occurs when the trial court’s

ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). To warrant reversal, an appealing party must demonstrate not only error, but also prejudice. *Id.*

In support of the court’s finding the trial court abused its discretion the court cited its recent opinion, *Matter of Daily*, 443 S.C. 557, 905 S.E.2d 310, (Ct. App. 2024), reh’g denied (Sept. 6, 2024). In that case, the court held the PPG test was not a reliable method of determining whether the offender was a sexually violent predator, and the admission was not harmless. *Id.* In *Daily*, as in its previous decision in *Bilton*, the court found the PPG test inadmissible “because there are no accepted standards for this test in the scientific community.” *Id.* At 565, 905 S.E.2d at 314.

“When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20–21, 515 S.E.2d 508, 518 (1999). The trial court should apply the *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979), factors to determine reliability. *Id.* The factors, include: (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. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990).

The trial court erred finding Gottfried’s testimony about the PPG test was admissible under these factors. While the PPG test has long been written about at least one publication that

Gottfried mentioned specifically was not relevant to its use in this case.<sup>4</sup> App. 40-41. Additionally, much of Gottfried's testimony regarding this factor was that she had written about the test and had given presentations about the test at different conferences. However, her testimony lacked any detail about specifically what her presentations and publications discussed about the PPG test.

The trial court erred finding there was standard application based on Gottfried's testimony. While Gottfried testified that PPG testing was being used in over fifty labs across the country, she specifically admitted that standardization was a problem that had not been resolved. Her testimony regarding Williford's test reflected those very problems as she admitted that Williford was given the entire RCV set although his offending pattern was against adult women and did not include children. Gottfried said that she has recently begun tailoring the tests for each examinee, which demonstrated that even her lab lacked sufficient standardization regarding how the test was administered.

The trial court erred finding that the standard for quality control procedures was met. Gottfried's testimony about quality control procedures was sparse and mainly revolved around the procedures used at the MUSC lab but again she was unable to testify regarding how the test is administered in other labs around the country.

Thus, the court of appeals correctly held the PPG not reliable, and the trial court abused its discretion in admitting the PPG results.

"[I]f the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Rule 403, SCRE. Once the evidence is

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<sup>4</sup> Gottfried mentioned a peer reviewed paper published in Nature on June 8, 2021. She stated that the paper "noted that the PPG may be useful as a non-invasive potential technique to evaluate penile erection in men's health." R. 40, ll. 1-11.

admitted under these standards, the jury may give it such weight as it deems appropriate.” *Council* at 20-21; 515 S.E.2d 518 (1999).

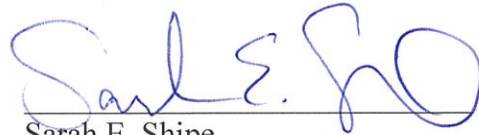
Moreover, any probative value of the PPG test was substantially outweighed by its prejudicial effect. Mr. Williford had a bench trial, however, that does not significantly lessen the prejudicial effect of Gottfried’s testimony about the PPG test chiefly, the prejudicial effect of the results. Oddly, Mr. Williford was given the entire RCV set although his offending pattern was not against children. Dr. Gottfried testified, the results from Mr. Williford’s test showed that he had a response to stimuli involving young children. This is greatly prejudicial, even to the trial court as the finder of fact.

The Court of Appeals properly found the error was *not* harmless where Dr. Gottfried relied heavily on the PPG and her testimony emphasized its importance in her conclusions. The court noted Gottfried’s admission that she could not conduct an evaluation without the PPG. Gottfried clearly disregarded evidence that Mr. Williford remitted and instead focused heavily on the results from the PPG test.

Respondent respectfully requests this Court deny the state’s petition for writ of certiorari because the Court of Appeals correctly analyzed the decision of the trial court according to the *Council* factors and relied on its own well-reasoned opinions in both *Daily* and *Biliton* in rendering its decision in this case. Respondent’s case presents no novel issues and there is no need for this Court to review the decision issued by the Court of Appeals. Accordingly, this Court should deny the state’s petition for certiorari.

**CONCLUSION**

Respondent respectfully requests this Court deny the petition for writ of certiorari.



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ATTORNEY FOR RESPONDENT

This 5th day of November, 2024.