

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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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  
Supreme Court Appellate Case No. 2024-001781

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

RESPONDENT.

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

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## ARGUMENT

Using mischaracterizations, misrepresentations and a truncated version of Dr. Emily Gottfried's testimony, Respondent engages in the same type of limited analysis the court of appeals used in this case. The State craves reference to the Petition for a Writ of Certiorari, the Final Brief of Respondent before the court of appeals and the Appendix for Dr. Gottfried's actual testimony.

In his "Statement of the Case," Respondent relies heavily on trial counsel's argument in support of the motion to exclude the PPG evidence. He also relies on Dr. Marie Gehle's testimony proffered in support of Respondent's motion, but fails to acknowledge Dr. Gehle's total lack of training on how to administer a PPG or interpret PPG results. She had no firsthand experience administering or even observing PPG tests, and she had a very limited understanding of how a PPG actually works. All her purported knowledge about the PPG was gleaned from some unidentified articles and an outdated 2009 publication.

In contrast to Dr. Gehle's total lack of experience and knowledge, Dr. Gottfried had extensive training on how the PPG works, how to administer a PPG and interpret the results, and she has firsthand experience actually administering PPG tests and interpreting the results. Dr. Gottfried 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, she has written book chapters about best practices in sexual behavior evaluations that included information about the PPG test, and she has given peer reviewed research presentations regarding the PPG test at national and international conferences. (Appendix, pp. 34-37). She testified that research literature indicates sexual arousal to non-consensual abusive scenarios is a strong predictor of sexual recidivism, the PPG test provides a physiological measure of male sexual arousal, and the PPG test has been peer reviewed in both the sex offender and general sexual behavior literature. (Appendix, pp. 39-40).

Dr. Gottfried further testified the recommendation not to use the PPG in the 2009 book Dr. Gehle referenced was premised on a 2006 article from Bill Marshall, the developer of the Marshall stimulus set, and he subsequently published another article in 2014 “that was much more supportive of the PPG.” She stated research since 2009, including a 2019 meta-analysis of data from multiple studies with PPG test results from 1000s of men, has addressed many issues identified in earlier PPG test research. In addition, the Diagnostic and Statistical Manual, 5<sup>th</sup> Ed., (DSM-5) recognizes the PPG test is the “most thoroughly researched and longest used” psychophysiological measure of sexual interests. (Appendix, pp. 49-50).

Respondent’s contention that the Real Child Voices (RCV) stimulus set had not been peer reviewed is simply inaccurate. Dr. Gottfried testified she is participating with international partners in studies comparing the RCV, Marshall and other stimulus sets, and abstracts of those studies have 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 the Association for the Treatment of Sexual Abusers. (Appendix, pp. 59-61). While it is true no articles about that research have been published to date, there are many forms of peer review, and the lack of publication is not dispositive. See In re Viagra, 424 F.Supp.3d 781, 791 (N.D. Cal. 2020) (expert testimony may be reliable and admissible without peer review and publication); United States v. Cloud, 576 F.Supp.3d 827, 841 (E.D. Wash. 2021) (existence of peer reviewed literature can help determine methodology’s reliability, but publication or the lack thereof is not dispositive).

Respondent also erroneously contends the State “relied heavily on the PPG evidence during her closing argument.” The State’s initial closing argument constitutes 59 lines across four pages

of the transcript. (Appendix, pp. 264-267). The total discussion of Respondent's PPG results is at most 14% of the entire argument. Importantly, prior to discussing Respondent's PPG results, the State laid out Respondent's sex offending history from 1996 and 2015, and the admissions Respondent made to Dr. Gottfried during his clinical interview, all of which the State argued "without the PPG evidence" indicated a current sexual interest in children, and "with or without the PPG indicates that he is likely to reoffend." Then, in responding to Respondent's closing argument, the State only mentioned that the PPG took place on the second day Respondent went to Dr. Gottfried's lab, and again focused on all the information Dr. Gottfried obtained and considered, including Appellant's sexual offending history, the multiple array of tests administered by Dr. Gottfried's lab, and Appellant's own statements during his interview with Dr. Gottfried. (Appendix, pp. 277-281).

Respondent also cites Dr. Gottfried's testimony about false positive PPG results, but misrepresents the context of her testimony. Dr. Gottfried did state there is no "real" way to check for false positive results, which is why her lab uses the PPG as only one data point and utilizes a conservative cut score to minimize the possibility of a false positive result; however, that was not the end of her testimony. She further testified they look for consistency between the person's offending history and self-report, and across "multiple trials" in the PPG test, to reach a conclusion regarding the person's diagnosis and risk. (Appendix, pp. 65-66). No scientific test is safe from false results, but recognizing the high stakes of SVPA evaluations, Dr. Gottfried's lab does as much as possible to minimize false positive results.

Respondent relies heavily on the court of appeals' reference to Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), citing dicta from the Bilton opinion that was based on the

same outdated articles and case law Respondent cites in support of his argument.<sup>1</sup> Respondent then summarily claims that “esoteric” and “junk science” accurately describe the PPG test. This assertion ignores, as did the court of appeals, the extensive amount of scientific research, studies and peer reviewed scholarly articles in scientific journals and presentations at national and international scientific conferences that clearly establish the PPG is neither esoteric (intended for or understood by only a small group) or “junk science” (assertions that have the appearance, but not the actuality, of scientific support).<sup>2</sup>

The evidence presented to Judge Henderson established that the PPG is now widely accepted as a valid, objective measure of male sexual arousal with application and use in the general health and mental health communities. The mere fact some may consider the PPG “controversial” does not render the PPG either esoteric or junk science.<sup>3</sup> Literally every scientific test was labeled as esoteric or junk science at one point, including DNA testing, but after research

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<sup>1</sup>Notably, relying on a 2006 Ninth Circuit Court of Appeals opinion, the Bilton court erroneously found that Dr. Gottfried’s lab “compels the subject to arouse himself sexually and then forces him to view deviant stimulants.” *Id.* at 444. Dr. Gottfried categorically put that assertion to rest in this case. (Appendix, p. 31).

<sup>2</sup> Indeed, Respondent’s trial counsel candidly conceded “we can accept that there has been studies about the use of the PPG test,” and stated Respondent’s main focus at trial was the RCV stimulus set. (Appendix, p. 67). As discussed above, studies of the RCV stimulus set have been peer reviewed through abstracts submitted to national and international professional conferences, and accepted for presentation at those conferences.

<sup>3</sup> Indeed, a prominent mental health expert in South Carolina testified that the Static99-R risk assessment is unreliable, but the Static99-R is accepted and used by virtually every other mental health expert in the field of sex offender risk evaluations. *See Matter of Chapman*, Appellate Case No. 2014-001181, Record on Appeal, pp. 64-67, 238-245, 252). Using Respondent’s conclusory logic, the Static99-R would be considered “esoteric” and “junk science.”

and study, many were gradually accepted as valid in that particular field.<sup>4</sup> Such is the case with PPG testing.

As Dr. Gottfried testified, there is ample evidence the PPG test is now widely researched and generally accepted. *See* Golde, J.A., et. al., Psychophysiologic Assessment of Erectile Response and Its Suppression as a Function of Stimulus Media and Previous Experience with Plethysmography, *Journal of Sex Research*, 37(1), 53–59 (2000); Letourneau, E.J., A Comparison of Objective Measures of Sexual Arousal and Interest: Visual Reaction Time and Penile Plethysmography, *Sex Abuse* 14(3), 207-23 (July 2002); Kalmus, Beech, Forensic Assessment of Sexual Interest: A Review, *Aggression and Violent Behavior*. Vol. 10 Issue 2, pp. 193–217 (2005); Stinson, J.D., Becker, J.V, Assessing Sexual Deviance: A Comparison of Physiological, Historical, and Self-Report Measures. *J. Psychiatric Practice*, 14(6):379-88 (Nov. 2008); Howes, R.J., Measurement of Risk of Sexual Violence Through Phallometric Testing, *Leg Med (Tokyo)* 11 Suppl 1:S368-369 (April 2009); Marshall W. L., Phallometric Assessments of Sexual Interests: An Update, *Current Psychiatry Rep.* 16(1):428 (Jan. 2014); Murphy, L., et. al., Standardization of Penile Plethysmography in Assessment of Problematic Sexual Interests, *J. Sex. Med.* 12(9): 1853-1861 (2015) (PPG test “is a widely recognized means of measuring male sexual arousal to given stimuli,” and “has become a standard objective measure of arousal and is considered by some researchers and clinicians to be essential in the assessment and treatment of male sex offenders and men with paraphilic interests”) (emphasis added); Murphy, L., et. al., Assessment of Problematic Sexual Interests with the Penile Plethysmograph: an Overview of Assessment

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<sup>4</sup>The on-going controversy regarding the reliability of COVID testing results amply demonstrates the fact that scientific tests can be controversial. Some professionals would, and do, label those tests “junk science,” but the test results are considered reliable by many healthcare professionals.

Laboratories, *Current Psychiatry Reports* 17(5):567 (2015) (PPG test “is an objective assessment of sexual arousal based on the change in penis circumference and volume due to increased vasocongestion in the penis”); Howes R. J. & Howes, S. E., Sexual Arousal as a Function of Stimulus Mode: Implications for Phallometric Assessment, *J. Forensic Res.* 8(6):398 (2017) (PPG test is “[p]erhaps the best means of objectively measuring deviant sexual interest”); Burke, W. & Murphy L., International Collaboration: The Development of the Real Child Voices Stimulus Set, Keynote Address – International Academy of Sex Research Annual Meeting (July 2017); Plaud, J.J., The Use of Penile Plethysmography in SVP Assessment and Treatment Decision Making, *Sexually Violent Predators: A Clinical Science Handbook* 243-254 (O’Donohue & Bromberg (eds.) (2019); Gottfried, E., Use of Penile Plethysmography in Evaluations with Individuals Who Commit Sex Offenses, South Carolina Chapter of the Association for the Treatment of Sexual Abusers Annual Conference Presentation (March 2019); McPhail, I.V., *et al.*, Validity in Phallometric Testing for Sexual Interests in Children: A Meta-Analytic Review, *Assessment* 26(3) 535-552 (2019); Murphy, L., Bradford, J. M., & Fedoroff, J. P., Laboratory Measurement of Penile Response in the Assessment of Sexual Interest, *Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues*, 159 (2021); Gottfried, E., *et al.*, Examining Relationships Between PPG Stimuli and a Visual Reaction Test of Sexual Interest, 40<sup>th</sup> Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers Presentation (September 2021). Rather than analyze the evidence presented, however, Respondent simply makes the conclusory assertion, much like the court of appeals did, that the PPG is unreliable and inadmissible.

In addition to the numerous peer reviewed articles and presentations regarding the PPG, and notwithstanding the Bilton dicta claiming near uniformity of other jurisdictions excluding PPG

evidence, courts have specifically recognized the general acceptance and admissibility of PPG evidence in sexually violent predator cases. The Washington Supreme Court found PPG test results were admissible as part of the diagnostic process, and the PPG test testimony would assist the jury in understanding the expert's sexual deviancy diagnosis.<sup>5</sup> In re Detention of Halgren, 156 Wash. 2d, 132 P.3d 714, 719 (2006). The court further found the issue of the PPG test's reliability goes to the weight of the evidence rather than its admissibility.<sup>6</sup> *Id.*; see also In re Detention of Herrick, 198 Wash. App. 439, 393 P.3d 879, 885 (2017) (PPG testing may provide critical information to an evaluator in determining if alleged sexual predator has a mental abnormality, and PPG testing is an effective and generally accepted method for evaluating sex offenders).

The Illinois appellate court also found PPG test evidence was admissible in In re Commitment of Sandry, 367 Ill.App.3d 949, 858 N.E.2d 295 (2006). As to the admissibility of a particular test or methodology, the court stated: "once it is determined that a methodology is generally accepted, it follows that it has achieved a sufficient degree of reliability and validity to cross the threshold of admissibility." *Id.* at 309 (emphasis added). The court then engaged in an exhaustive analysis of case law (use of PPG mentioned in at least 21 states, including South Carolina), statutes (eleven state statutes) and regulations. *Id.* at 310-313.

The Sandry court also discussed numerous academic articles, which it determined provided ample support "to conclude that PPG testing is accepted by a substantial number of experts in this

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<sup>5</sup>Significantly, Washington's sexual predator statute expressly gives the courts discretion to order the person to comply with a PPG test if requested by the evaluator. RCW §71.09.050(1). Thus, the Washington legislature recognized the PPG test is a valuable tool that should be available to evaluators if they believe it is necessary, and the Washington courts have found it to be reliable.

<sup>6</sup>The Bilton court dismissed Halgren as distinguishable because the Washington court found the PPG test was not novel and subject to the test for scientific evidence. This ignored the expressly stated reason for the Washington court's finding, which was that the PPG test had been analyzed in a previous case and found to be an effective method for assessing and treating sex offenders. 132 P.3d at 719.

field such that it may be used to support a qualitative assessment of the future dangerousness of an individual.” *Id.* at 309-316 (emphasis added). Acknowledging some experts have criticized and rejected PPG testing, the court noted the existence of contrary authority is not dispositive because many people could disagree on the acceptance of any given methodology, but those who accept it may still constitute a significant subset of experts in any given field. *Id.* at 316; *see also State v. Graham*, 275 Kan. 176, 183, 61 P.3d 662, 667 (2003) (some disagreement in the scientific and medical community as to the reliability of a particular test method is a matter affecting the weight of such evidence and not its admissibility; such evidence is admissible if a qualified expert witness testifies the particular test method is reliable and accurate, and it is generally accepted as such by other experts in the field).

The Bilton court distinguished Sandry on the premise that “Illinois courts do not examine reliability before scientific evidence is admitted,” and did not even address all the case law and research articles discussed in Sandry. 432 S.E.2d at 446. As with its dismissal of Halgren, the court’s conclusion that Illinois courts do not examine reliability ignored a very significant part of the Sandry opinion, which analyzed Illinois case law expressly stating that “[t]he determination of the reliability of an expert’s methodology is naturally subsumed by the inquiry into its general acceptance in the scientific community.” 857 N.E.2d at 308 (*quoting Donaldson v. Central Illinois Public Service Co.*, 767 N.E.2d 314 [2002])(emphasis added). Thus, in examining whether the PPG test is generally accepted in the scientific community, the Sandry court necessarily considered “reliability,” and its discussion of evidence indicating the PPG test is reliable and generally accepted is directly relevant here.

In addition to the cases, studies, peer reviewed articles and presentations indicating the PPG test is reliable and generally accepted, the PPG test has undergone Federal Drug Administration (FDA) review, and the FDA has approved several PPG systems, including the Limestone system used in this case.<sup>7</sup> In addition, the Medicaid/Medicare regulations provide coverage for PPG tests.<sup>8</sup> Major insurance companies, such as Blue Cross/Blue Shield, also recognize the PPG test as a medical procedure, and either provide limited coverage or exclude it from coverage.<sup>9</sup> The federal government's and insurance companies' recognition of the PPG test as a valid medical procedure amply demonstrates its general acceptance in the health care community that provides a reliable measure of men's sexual health.

Again, citing Bilton, the court of appeals found, and Respondent asserts, that the PPG evidence "had the appearance of scientific evidence." Notably, the Bilton court 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, and Respondent's argument, 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 fact that the PPG is a recognized scientific test is amply supported by simply looking at the scientific publications listed above that include articles

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<sup>7</sup>See [https://www.accessdata.fda.gov/cdrh\\_docs/pdf5/K052929.pdf](https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf) (501(k) Summary – Limestone Technologies, Inc.)

<sup>8</sup>See Federal Register Volume 72, Number 61, Addendum III and Addendum V (Friday, March 30, 2007) (<https://www.gpo.gov/fdsys/pkg/FR-2007-03-30/html/07-1414.htm>).

<sup>9</sup>The PPG test is not just utilized in psychosexual evaluations and/or treatment, but it used in general medical health care as well. See Blue Cross Blue Shield of Texas, Treatment of Male Sexual Dysfunction, Special Comment on Contract Exclusions (January 7, 2003) (<https://www.bcbstx.com/provider/pdf/medicalpolicies/surgery/717-010.pdf>).

regarding the PPG, as well as the approval of the PPG by the FDA and insurance companies.<sup>10</sup>

As to the harmless error issue, Respondent essentially ignores the substance of the harmless error argument set forth in the Petition, instead relying on cherry-picked snippets of Dr. Gottfried's testimony regarding the PPG, and based on his conclusory assertion the PPG is unreliable, summarily concluding the PPG evidence "had no probative value." As Dr. Gottfried repeatedly testified, the PPG test results was only one data point in her multimethod evaluation, and as discussed in the Petition, it did not constitute a significant part of her testimony before the jury. Given the issues in SVPA proceedings, the probative value of the PPG test results simply cannot be seriously disputed.

Further, Respondent chose to completely ignore the other, and overwhelming, evidence presented to the jury, which is set forth in the Petition, that provides ample support for the jury's verdict, even without the PPG evidence. (Petition, pp 19-20). Both experts found Respondent has a mental abnormality that is causally connected to his sexual offending, and they only 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, including Respondent's own admissions. Dr. Gehle's opinion on that issue, however, was essentially based on Respondent's statements during their interview, and significantly, the testimony revealed Respondent lied to her about some critical aspects of his history.

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

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<sup>10</sup>Those publications include the Journal of Sex Research, the Journal of Psychiatric Practice, Current Psychiatry Reports, the Journal of Forensic Research, and the Sexually Violent Predators: A Clinical Science Handbook.

(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. In addition, 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.<sup>11</sup>

Propensity is a central focus of SVPA cases. In re Corley, 353 S.C. 202, 577 S.E.2d 451, 454 (Ct. App. 2003) ("a person's dangerous propensities are the focus of the SVP Act"). The State bears the burden to prove beyond a reasonable doubt that the person's dangerous propensities make him likely to reoffend sexually in the future. The PPG has been repeatedly recognized as an important tool for an expert conducting a thorough psychosexual evaluation to use in determining the person's future risk to reoffend.<sup>12</sup> If the expert uses the PPG test results in forming an opinion on that issue, the test results can provide important information for a factfinder charged with determining beyond a reasonable doubt whether the person is a risk to reoffend sexually in the future.

This case, as well as others currently pending before the Court on petitions for certiorari, demonstrate the reliability of the PPG.<sup>13</sup> Respondent has a long history of sexual offenses against prepubescent children that persisted even after he was sanctioned by the judicial system and had

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<sup>11</sup> As stated in the Petition, the State does not concede error in admitting the PPG evidence and submits this argument in response to the court of appeals' flawed harmless error analysis and the arguments in Respondent's Return.

<sup>12</sup> No one disputes that the PPG is useful and reliable for treatment of sex offenders. If the PPG is reliable for treatment purposes, it is reliable for assessment purposes as well.

<sup>13</sup> Matter of Daily, Appellate Case No. 2024-001707; Matter of Williford, Appellate Case No. 2024-001782. There are two other cases currently pending before the court of appeals in which the PPG is an issue.

sex offender treatment while incarcerated and in the community. On the PPG, Respondent showed significant arousal across two different stimulus sets to multiple stimulus scenarios involving sexual molestation of prepubescent children. In short, the PPG accurately measured Respondent's continuing sexual arousal to prepubescent children, which greatly increases his risk to reoffend against prepubescent children in the future.

The evidence establishes the court of appeals erred in holding that the PPG is unreliable and PPG evidence is inadmissible, and then its harmless error analysis was fundamentally flawed. Accordingly, the court of appeals opinion should be reversed.

**CONCLUSION**

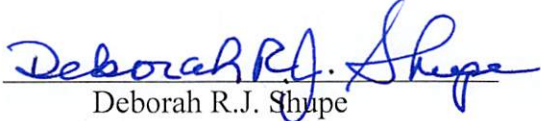
Based on the foregoing, the matter set forth in the Petition for a Writ of Certiorari, the Final Brief of Respondent before the court of appeals, and the Appendix, Petitioner submits this Court should grant the Petition for a Writ of Certiorari to the Court of Appeals, reverse the court of appeals opinion, and affirm Respondent's commitment as a sexually violent predator.

Respectfully Submitted,

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