

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Florence County
The Honorable Roger E. Henderson, Circuit Court Judge
On Certiorari to the Court of Appeals
Court of Appeals Appellate Case No. 2021-000734
Supreme Court Appellate Case No. 2024-001781

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

RESPONDENT.

BRIEF OF PETITIONER STATE OF SOUTH CAROLINA

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TABLE OF CONTENTS

Table of Authorities ii

Question Presented..... 1

Statement of the Case.....1

Statement of Facts.....3

Argument16

 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 is a recognized reliable scientific measure of deviant sexual interest in the field of sex offender evaluation and treatment, and its harmless error analysis was fundamentally flawed..... 16

Conclusion.....37

TABLE OF AUTHORITIES

Page(s)

Cases

Donaldson v. Central Illinois Public Service Co., 767 N.E.2d 314 (2002) 22

In re Care and Treatment of Bilton, 432 S.C. 157, 851 S.E.2d 442
(Ct. App. 2020) 18, 19, 20, 21, 22, 23, 29, 30, 31

In re Care and Treatment of Daily, 443 S.C. 557, 905 S.E.2d 310
(Ct. App. 2024) 17, 18, 20, 29

In re Care and Treatment of Gregg, Op. No. 2022-UP- 336 (S.C. Ct. App.
filed August 10, 2022), *cert. granted* May 23, 2023, *cert. dismissed as
improvidently granted* June 5, 2024..... 20

In re Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (Ct. App. 2003) 28

In re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003) 30

In re Care and Treatment of Ridley, 433 S.C. 316, 858 S.E.2d 165 (Ct. App. 2021) 18

In re Care and Treatment of Williford, Op. No. 2024-UP-271 (S.C. Ct. App. filed
July 24, 2024), *cert. granted* February 12, 2025. 17, 20

In re Commitment of Sandry, 367 Ill.App.3d 949, 858 N.E.2d (2006) 21, 22, 26

In re Detention of Halgren, 156 Wash. 2d, 132 P.3d 714 (2006) 20, 21

In re Detention of Herrick, 198 Wash. App. 439, 393 P.3d 879 (2017) 21

Johnson v. Horry County Solid Waste Auth., 389 S.C. 528, 698 S.E.2d 835
(Ct. App. 2010) 15

Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007) 15

Morris v. BB&T Corp., 438 S.C. 582, 885 S.E.2d 394 [2023] 18, 23

State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 [2015] 15

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) 3

State v. Davis-Kocsis, 443 S.C. 127, 903 S.E.2d 491 17

State v. Graham, 275 Kan. 176, 61 P.3d 662 (2003) 22

<u>State v. Heller</u> , 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012).....	30
<u>State v. Jackson</u> , 384 S.C. 29, 681 S.E.2d 17 (Ct. App. 2009).....	15, 17
<u>State v. Jones</u> , 343 S.C. 562, 541 S.E.2d 813 (2001)	16
<u>State v. Lyles</u> , 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008).....	15
<u>State v. McFarlane</u> , 279 S.C. 327, 306 S.E.2d 611 (1983).....	30
<u>State v. Phillips</u> , 430 S.C. 319, 844 S.E.2d 651 (2020)	23, 26
<u>State v. Prather</u> , 429 S.C. 583, 840 S.E.2d 551 (2020).....	15, 17
<u>State v. Wallace</u> , 440 S.C. 537, 892 S.E.2d 301 (2023)	15, 18, 23

Rules

Rule 403, SCRE.....	15
---------------------	----

Statutes

Rev. Code of Wash. Ann. §71.09.050(1) (West).....	21
---	----

Other Authorities

(501(k) Summary – Limestone Technologies, Inc. https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf	26
<u>About the Penile Plethysmograph</u> (2025) [https://arizonaforensics.com>about-the-penile-plethysmograph-new] (2025).....	26
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McPhail, I.V., <i>et al.</i> , <u>Validity in Phallometric Testing for Sexual Interests in Children: A Meta-Analytic Review</u> , Assessment 26(3) 535-552 (2019).....	25
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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 is a recognized reliable scientific measure of deviant sexual interest in the field of sex offender evaluation and treatment, and its harmless error analysis was fundamentally flawed?

STATEMENT OF THE CASE

Respondent Andy Eugene Hyman was found to be a sexually violent predator at a jury trial before the Honorable Roger E. Henderson, Circuit Court Judge, in June 2021 and civilly committed to the Sexually Violent Predator Treatment Program for long term control, care and treatment. The court of appeals reversed his commitment, finding that Judge Henderson erred by allowing the State's expert to testify regarding a penile plethysmograph (PPG) performed by her lab. The State petitioned for a rehearing, which the court of appeals denied. The State petitioned for a writ of certiorari to the court of appeals, which this Court granted by Order filed February 12, 2025.

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 PPG performed during a comprehensive psychosexual evaluation of Respondent's mental status and risk to reoffend sexually. Before swearing the jury, Judge Henderson conducted a full evidentiary hearing pursuant to State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), during which the DMH evaluator who performed Respondent's initial evaluation testified for Respondent, and Emily Gottfried, Ph.D., of the Medical University of South Carolina (MUSC), testified for the State.

Pre-Trial Hearing

DMH Evaluator

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

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

On cross-examination, the DMH evaluator acknowledged the “best practices” book she referenced was published in 2009, and stated she was unaware of any updates since the original publication. She testified 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 is not trained to administer a PPG, she has no expertise in using the PPG, she has never published any articles about the reliability of the PPG, and she has never seen a PPG performed. In addition, she was unaware of a 2019 meta-data study out of Washington State which found the PPG had a 92% reliability factor in reproducing results indicating a pedophilic disorder. (Appendix, pp. 25-32).

Dr. Emily 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’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, and has given research presentations regarding the PPG at national and international conferences. (Appendix, pp. 34-37).

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

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

The SBCL has a standard protocol used in every PPG performed there. The PPG room is climate controlled, including the humidity and temperature, and the gauge used in the PPG must be calibrated using a five step process before the PPG can start. The 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 as a data point in sexual behavior evaluations and treatment. Dr. Gottfried stated that “responsible use means you are following the protocol,” “interpreting the results in a standardized manner,” and “not using [the PPG 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 the DMH evaluator 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 results of over 10,000 men, addressed many issues identified in earlier PPG research. In addition, the Diagnostic and Statistical Manual, 5th Ed., (DSM-5) recognizes use of the PPG. (Appendix, pp. 49-50).

Dr. Gottfried further 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 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 reoffended 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 Real Child Voices (RCV) stimulus set, which comes with every PPG 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 stated 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 has been increasing, and a 2019 “best practices” book regarding sexually violent predator evaluations includes a chapter discussing the utility of using the PPG in sexually violent predator evaluations. She emphasized she uses the

PPG results as one data point, and she 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 professional 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, 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 results, Dr. Gottfried reiterated that 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 trials in the stimulus sets. (Appendix, pp. 65-67).

Pre-Trial Ruling

At the conclusion of testimony, Respondent acknowledged there are studies regarding the PPG, 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 results was only one data point she considered in her evaluation. The State further argued the PPG 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 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 precommitment evaluation of Respondent pursuant to the SVPA. As part of her evaluation protocol, she reviews 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 assessments and a clinical interview that included reviewing the assessments’ 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. (Appendix, pp. 118-119).

While incarcerated on that conviction, Respondent attended the Department of Corrections sex offender treatment program for approximately five or six months until he was transferred to a different prison. After he was released, Respondent was ordered to attend treatment but he told Dr. Gottfried he was kicked out of a treatment program because he had to go to work and could not get in touch with the provider. He said he did complete a six month program, but when asked what he learned in that program, Respondent “said that he didn’t really learn anything and couldn’t really remember what had been covered.” (Appendix, pp. 119-120).

Respondent told Dr. Gottfried that he got married and had children between the time Respondent was released from prison until 2016. He reported “seeking out semi-nude or sexualized (six) images of young children” between the ages of eight and fourteen in bras and panties during that time. (Appendix, p. 119).

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 stated that 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 assessments the SBCL uses in evaluating all adult men, including Respondent, as part of the psychosexual evaluation, including the Minnesota Multiphasic Personality Inventory Version 3 (MMPI), the Personality Assessment Inventory (PAI), and the Multidimensional Inventory of Development Sex and Aggression. (MIDSA). The results from these assessments 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 evaluation 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 in general, explaining what it measures and how it is administered, and describing the stimulus sets used during the PPG.¹ She then testified Respondent showed clinically significant arousal on both stimulus sets to trials 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 trial featuring sexual violence against a prepubescent female child, and his maximum arousal on the second stimulus set was to a trial featuring coercion against a female prepubescent child. Dr. Gottfried stated the PPG arousal pattern was consistent with Respondent's history of sexually offending against prepubescent female children. (Appendix, pp. 137-142).

¹ The Marshall and RCV are stimulus "sets" and the individual scenarios within the sets are "trials."

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).

DMH Evaluator's Trial Testimony

The DMH evaluator 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. The DMH evaluator stated she heard Dr. Gottfried's testimony regarding the PPG results, and she was not surprised by any of the results. (Appendix, pp. 183-204).

The DMH evaluator 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.” She 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, the DMH evaluator 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 he subsequently reoffended. He also denied he was at any risk to reoffend. (Appendix, pp. 217-223).

Respondent’s Trial Testimony

Respondent testified about how rough things were in prison, and things he learned while housed in the character dorm. He took a Christian based class that covered how to deal with things in life, and he stated that it had changed him. He apologized to his victims and said he wanted to ask for forgiveness. He talked about the impact on his son of his last arrest, who was picked on and had to go to counseling. He testified he planned to go to a program called Jumpstart if he was released, which is a Christian based organization that gives its members transitional housing and helps them find jobs and connect with life on the outside of prison. He stated he would not reoffend because he would not put himself “in that situation” and “not be alone around no little kids.” (Appendix, pp. 238-247).

On cross-examination, Respondent admitted he never asked to receive sex offender treatment while he was incarcerated. He claimed that he did not have sexual thoughts when he looked at a young girl, and that he had an erection to the PPG trials regarding children because “you supposed to be totally still and I was scratching so bad, itching, I guess, I got a rash.” He stated he was “itching between my chest,” then stated he was “scratching between my legs and it cause a rise,” but he was “not sexually excited to none of that stuff.” (Appendix, pp. 247-251).

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, the court of appeals’ failure to properly analyze the PPG evidence presented to Judge Henderson, and error in the court of appeals’ harmless error analysis. (Appendix, pp. 455-470). By Order filed September 20, 2024, the court of appeals denied the State's petition. (Appendix, p. 483). This Court granted the State’s Petition for a Writ of Certiorari on February 12, 2025.

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.” State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009). “The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion.” State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020) (*quoting* State v. Chavis, 412 S.C. 101, 771 S.E.2d 336, 338 [2015]). “A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion,” which “occurs when the conclusions of the [trial] court are either controlled by an error of law or are based on unsupported factual conclusions.” *Id.* (alteration in original). *See also*, State v. Wallace, 440 S.C. 537, 892 S.E.2d 301, 307 (2023) (appellate courts will not reverse a trial court's ruling on evidentiary issues unless the trial court did not act within the discretion granted to trial courts).

Appellate courts review Rule 403 rulings pursuant to an abuse of discretion standard and give great deference to the trial court. Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197, 199 (2007). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should only be reversed in exceptional circumstances. Johnson v. Horry County Solid Waste Auth., 389 S.C. 528, 698 S.E.2d 835, 838 (Ct. App. 2010); State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 207 (Ct. App. 2008) (“If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate court.”).

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 is a recognized reliable scientific measure of deviant sexual interest in the field of sex offender evaluation and treatment, and its harmless error analysis was fundamentally flawed.

Introduction

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 and misapplied the appropriate standard of review on appeal. In particular, during the 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 Council, the State presented accepted, scientific evidence that amply supports Judge Henderson's ruling that the PPG evidence was admissible 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 analyze the evidence presented to Judge Henderson during the Council hearing. The court of appeals decided the case without oral argument and disregarded the substantial evidence in the record, as well as the multiple scholarly publications and presentations regarding the general reliability and acceptance of the PPG that were cited in the State's Brief.

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 State raised these issues in its Petition for Rehearing, which the court of appeals denied. The court of appeals opinion in this case relies in part on the first published opinion in South Carolina expressly finding the PPG is unreliable and evidence regarding it is inadmissible. *See In re Care and Treatment of Daily*, 443 S.C. 557, 905 S.E.2d 310 (Ct. App. 2024), *cert. granted* February 12, 2025.² The court of appeals reached its conclusions based on an impermissible *de novo* review, and it failed to consider the entire record in its harmless error analysis. The reliability of PPG results, particularly in sexually violent predator proceedings, is an important novel issue in South Carolina.

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. *Prather*, 840 S.E.2d at 559 (2020); *State v. Jackson*, 681 S.E.2d at 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

²In addition to *Daily* and this case, the Court granted a writ of certiorari to review the court of appeals decision in another PPG case, *In re Care and Treatment of Williford*, Op. No. 2024-UP-271 (S.C. Ct. App. filed July 24, 2024), *cert. granted* February 12, 2025.

applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it.” State v. Wallace, 892 S.E.2d at 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 Care and Treatment of Ridley, 433 S.C. 316, 858 S.E.2d 165, 168-169 (Ct. App. 2021).

1. PPG Reliability

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 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.

Judge Henderson heard extensive testimony regarding competing views regarding PPG reliability. The DMH evaluator testified she read articles about PPG standardization issues, and

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.

cited a “best practices” book published in 2009, which recommended against using the PPG in precommitment sexually violent predator evaluations. She stated the PPG is used in treatment, but differentiated treatment use from sexual predator evaluations because of the possible outcomes. She testified there was no “research on the stimulus sets used at MUSC, specifically the RCV, showing it is a reliable assessment of pedophilic arousal.” (Appendix, pp. 13-25).

On cross-examination, however, the DMH evaluator admitted the 2009 “best practices” book she cited had not been updated since 2009, and stated she was unaware of any developments in standardizing the RCV and Marshall stimulus sets. She further admitted she had no training or experience in administering PPGs or interpreting PPG results, she had never seen a PPG performed, and she was “not aware” there was a protocol and standard procedure for administering a PPG. The DMH evaluator was unaware of the 2019 meta-analysis of multiple studies involving thousands of PPGs, even stating she did not “actually know what [State’s counsel was] talking about.” She testified she heard the PPG stimulus sets “once,” but it had been “too long” ago for her to state what a particular trial described. (Appendix, pp. 25-32). In short, The DMH evaluator’s knowledge regarding the PPG was extremely limited.⁴

By comparison, Dr. Gottfried testified extensively regarding the use and reliability of the PPG, including her first-hand training and experience, multiple research studies and publications

⁴Before the court of appeals, Respondent relied on the DMH evaluator’s testimony and Bilton as support for excluding the PPG evidence in this case, which is interesting. In Bilton, the court of appeals held that the State’s expert was not qualified to testify about the PPG because she possessed only a basic familiarity with the PPG and how it is performed, had never seen one performed, was not familiar with the stimulus sets and machine, and did not know who actually conducted the PPG. 851 S.E.2d at 445. If the Bilton court found the expert’s qualification and experience with the PPG was insufficient to establish basic reliability, the DMH evaluator’s utter lack of qualification and experience with the PPG patently renders her testimony insufficient to establish the PPG is not reliable, especially when compared with Dr. Gottfried’s extensive knowledge and first-hand experience with conducting and interpreting PPGs.

regarding the reliability of the PPG, the DSM-5 reference to the PPG, and Dr. Gottfried's active participation in on-going national and international studies and scientific presentations regarding the PPG in general and the RCV stimulus set in particular. She testified in-depth regarding the SBCL protocols and quality control procedures used in every PPG the lab conducts.⁵ She stated the PPG research has been increasing, and a 2019 "best practices" book specifically about sexually violent predator evaluations includes a chapter discussing the utility of PPG in such evaluations.

The court of appeals cited dicta from Bilton for the proposition that courts have "uniformly" declared the PPG inadmissible. To the contrary, courts, including South Carolina circuit courts, have recognized the general acceptance and admissibility of the PPG in sexually violent predator cases.⁶ In In re Detention of Halgren, 156 Wash. 2d, 132 P.3d 714 (2006), the Washington Supreme Court found the PPG results were admissible as part of the diagnostic process, and the PPG testimony would assist the jury in understanding the expert's sexual deviancy

⁵In the court of appeals, Respondent discounted the training and protocols established by Limestone and utilized at MUSC because Limestone "is merely a company that developed the hardware and software used by some psychologists to conduct the PPGs," and no "independent agency" certifies the labs or analysts. (Appendix, p. 412). It is simply inaccurate to claim no independent agency has evaluated Limestone's system. As discussed below, federal government agencies and private insurance companies have evaluated the Limestone system and approved it as a valid medical test. Once the system was approved, who better than the company that developed it to train people how to use it?

⁶Including Judge Henderson, six South Carolina circuit court judges have heard extensive evidence and determined the PPG is reliable and admissible. See In re Care and Treatment of Gregg, Op. No. 2022-UP- 336 (S.C. Ct. App. filed August 10, 2022) (reversing Judge D. Jefferson's admission of PPG evidence), *cert. granted* May 23, 2023, *cert. dismissed as improvidently granted* June 5, 2024; In re Care and Treatment of Daily, 443 S.C. 557, 905 S.E.2d 310 (Ct. App. 2024) (reversing Judge Kelly's admission of PPG evidence), *cert granted* February 12, 2025; In re Care and Treatment of Williford, Op. No. 2024-UP-270 (S.C. Ct. App. filed July 24, 2024) (reversing Judge Sprouse's admission of PPG evidence), *cert granted* February 12, 2025); In re Care and Treatment of Pough, C.A. No. 2022-CP-28-00351 (Coble, J.) (appeal pending); In re Care and Treatment of Sharp, C.A. No. 2022-CP-21-01382 (Price, J.) (appeal pending).

diagnosis.⁷ *Id.* at 719. The court further found the issue of the PPG’s reliability goes to the weight of the evidence rather than its admissibility.⁸ *Id.*; *see also* In re Detention of Herrick, 198 Wash. App. 439, 393 P.3d 879, 885 (2017) (the PPG may provide critical information to an evaluator in determining if alleged sexual predator has a mental abnormality, and the PPG is an effective and generally accepted method for evaluating sex offenders).

The Illinois appellate court found that PPG 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. The court then engaged in an exhaustive analysis of case law [use of the PPG mentioned in at least 21 states, including South Carolina], statutes [eleven state statutes] and regulations regarding the PPG. *Id.* at 310-313.

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

⁷Significantly, Washington’s sexual predator statute expressly gives the courts the discretion to order the person to comply with a PPG if requested by the evaluator. Rev. Code of Wash. Ann. §71.09.050(1) (West). Thus, the Washington legislature recognizes the PPG is a valuable tool that should be available to evaluators if they believe it is necessary.

⁸The Bilton court dismissed Halgren as distinguishable because the Washington court found the PPG was not novel and subject to the test for scientific evidence. This ignored that the basis for the Washington court’s finding was that the PPG 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.

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. 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 “[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.

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 the PPG cases, both published and unpublished, reveal a consistent negative view of the PPG

regardless of the evidence presented.⁹ 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 its own 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. Gottfried was qualified as an expert and has extensive experience administering and interpreting the PPG results. She testified that research conducted since 2009, including a 2019 meta-analysis of data from multiple studies with the PPG results of over 10,000 men, addressed many issues identified in earlier PPG research, and that the DSM-5 recognizes the use of the PPG as the “most thoroughly researched and longest used of the [psychophysiological] measures.” (Appendix, pp. 49-50). She further testified that research indicates the PPG reliably identifies

⁹Beginning with Bilton, the court of appeals opinions in this case and other cases involving the PPG reveal a negative attitude toward the PPG that is exhibited by the lack of any real analysis of the undisputed evidence before the circuit court judges who have heard the evidence and determined the PPG is reliable and evidence regarding it is admissible. This Court has granted certiorari in four of those cases, and including this case, there are currently three PPG cases pending before this Court. In addition, there are currently two PPG cases pending before the court of appeals.

men, like Respondent, who are sexually attracted to children, and PPG research is ongoing and increasing, such as the 2019 meta-analysis study and published article. (Appendix, pp. 50-59).¹⁰

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 the DMH evaluator, 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, as noted above, the DMH evaluator was forced to admit that the 2009 manual she referenced and relied on 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.¹¹ (Appendix, pp. 25-32).

There is ample evidence the PPG is 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*

¹⁰On 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).

¹¹In short, the only thing remarkable about the DMH evaluator's pre-trial testimony regarding the PPG was her incredible lack of knowledge.

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); 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, 40th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers Presentation (September 2021).

The PPG “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.” Murphy, L., *et al.*, Standardization of Penile Plethysmography in Assessment of Problematic Sexual Interests, J. Sex. Med. 12(9): 1853-1861 (2015); *see also* Murphy, L., *et al.*, Assessment of Problematic Sexual Interests with the Penile Plethysmograph:

an Overview of Assessment Laboratories, Current Psychiatry Reports 17(5):567 (2015) (PPG “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 is “[p]erhaps the best means of objectively measuring deviant sexual interest”); Bickle, A., Et al., International overview of phallometric testing for sexual offending behaviour and sexual risk, BJPSYCH International, Vol. 8, No. 4, p. 11 (November 2021) (the PPG “is an objective method of assessing male sexual arousal”); Penile Plethysmography: Measuring Man’s Sexual Arousal, March 22, 2024 [<https://www.icliniq.com/articles/men’s-health/penile-plethysmography/>] (PPG is “known as the most reliable objective method of assessment male sexual arousal to distinct stimuli” and it “contributes to diagnosing and treating men with paraphilic interests”); Penile Plethysmography (PPG): Measuring Sexual Arousal, November 16, 2024 [<https://chinnurology.com/penile-plethysmography/>] (PPG “is a medical assessment tool that objectively measures a man’s sexual arousal to various stimuli” “by measuring blood flow to the penis, considered the most reliable physiological indicator of sexual interest in males”); About the Penile Plethysmograph (2025) [<https://arizonaforensics.com/about-the-penile-plethysmograph-new/>] (the PPG meets and exceeds the Daubert standard; both Monarch and Limestone systems “have research-based standardized protocols and certification programs that ensure standardization of testing conditions, test instructions, scoring and interpretation methodology as well as report writing.”). While some controversy regarding the PPG remains, as the Sandry court noted, the existence of contrary authority is not dispositive.¹²

¹²Indeed, DNA evidence has been widely accepted for years, but its admission is still challenged. See State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020) (evidence regarding “touch DNA” was inadmissible).

In addition to numerous studies, articles and peer-reviewed presentations indicating the PPG is reliable and generally accepted, the PPG has undergone Federal Drug Administration (FDA) review, and the FDA has approved several PPG systems, including the Limestone system used in this case.¹³ In addition, the Medicaid/Medicare regulations provide coverage for PPGs.¹⁴ Major insurance companies, such as Blue Cross Blue Shield, also recognize the PPG as a medical procedure, and either provide limited coverage or exclude it from coverage.¹⁵ The federal government's and insurance companies' recognition of the PPG as a valid medical procedure amply demonstrates its general acceptance in the health care community.

Further evidence of the PPG's general acceptance in the mental health community is in the DSM-5, which provides:

Psychophysiological measures of sexual interest may sometimes be useful when an individual's history suggests the possible presence of pedophilic disorder but the individual denies strong or preferential attraction to children. **The most thoroughly researched and longest used of such measures is penile plethysmography**, although sensitivity and specificity of diagnosis may vary from one site to another.

¹³See https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf (501(k) Summary – Limestone Technologies, Inc.); see also About the Penile Plethysmograph, *supra* (The FDA considers the PPG to be a Class II medical device.”). Thus, contrary to Respondent's assertion there was no independent third party assessment of the Limestone PPG system, the Limestone system has been reviewed and approved by an independent governmental agency.

¹⁴See 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>).

¹⁵The PPG is not just utilized in psychosexual evaluations and/or treatment, but 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>). Thus, in addition to FDA review, the Limestone PPG system has also been reviewed and accepted as a valid medical assessment tool by an independent third party insurance company.

DSM-5-R 699 (emphasis added).¹⁶ While previous DSM versions did not recognize the PPG at all, by the time the DSM-5 was published in 2013, there was sufficient research indicating the PPG's validity as a tool to measure an individual's sexual interest.¹⁷

In psychosexual behavior evaluations, the PPG provides data useful in determining an individual's level of risk to commit acts of sexual aggression by measuring the extent to which the individual is dominated by sexual arousal to deviant stimuli, and predictions of risk to re-offend "are rendered much more accurate by the inclusion of data from this technique." Howes, R. J., *supra*. "Although not universally embraced, there nonetheless remains widespread acceptance and recognition of the value of phallometric assessment," and it "is certainly an assessment procedure which has come a long way since it was first devised." Howes & Howes, *supra* (emphasis added). *See also* Tong, Dean, The Penile Plethysmograph, Abel Assessment for Sexual Interest, and MSI-II: Are They Speaking the Same Language? 35 Am. J. of Fam. Therapy, 187, 190 (2007) ("The PPG, when administered properly, represents a direct and objective measurement of a man's level of sexual arousal to normal versus sexualized stimuli. Since there is a strong relationship between an individual's pattern of sexual arousal and the probability that he may or will act upon that arousal, an important first step in gauging one's propensity to sexual deviancy is to obtain an accurate assessment of that person's sexual arousal patterns, which is precisely what the PPG

¹⁶Sensitivity is true positive and specificity is true negative. The variation in sensitivity and specificity between sites is tied to the cut score each site chooses to use to measure a significant positive result, not the reliability of the PPG itself. Again, the raw data remains the same, and any differences between the cut scores can be explored during cross-examination of the expert(s).

¹⁷Published in February 2022, the DSM-5-TR contains the same language on page 795, but adds that sites "frequently use different stimuli, procedures and scoring." As discussed above, however, the Limestone PPG system used by MUSC has standardized protocols and procedures utilized in between fifty and one hundred labs across the country and internationally, and MUSC intentionally uses a cut score double the cut score recommended in the research literature to minimize the possibility of false positive results.

does.”) (emphasis added); Peters, James M., Assessment and Treatment of Sex Offenders: What Attorneys Need to Know, *Advocate*, 23 (Dec. 1999) (PPG “is invaluable in the evaluation, treatment and management of known sexual offenders.”) (emphasis added).

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.¹⁸ 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.

Many of the published articles cited above, and well as the government and insurance company approval of the PPG, were cited in the Final Brief of Respondent in the court of appeals in this case, as well as the briefs submitted in PPG cases pending before the court of appeals at the same time. The court of appeals apparently did not consider the extensive psychology and medical professionals’ acceptance of the PPG because none were cited in the unpublished opinion. Rather, the court of appeals cited the Daily opinion and dicta from Bilton as the only support for its finding that the PPG is unreliable and it was error to admit the PPG evidence.

¹⁸No one disputes that the PPG is useful and reliable for treatment of sex offenders, and other than conclusory assertions that the PPG is somehow not reliable for pre-treatment assessments, the detractors cite no legitimate basis for differentiating between treatment and pre-treatment evaluation PPGs. If the PPG is reliable for treatment purposes, it is reliable for pre-treatment evaluation purposes as well.

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 reverse the court of appeals opinion, affirm Judge Henderson's ruling that the PPG is admissible, and reinstate the jury verdict finding Respondent is a sexually violent predator beyond a reasonable doubt.

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 Care and Treatment of 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.¹⁹

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 (a PPG) performed by someone else, which was an express recognition that the PPG is a **scientific** test. Thus, the court of appeals' finding that Dr. Gottfried's testimony merely “had the appearance of scientific work”

¹⁹The 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.

is contrary to the Bilton court's recognition that PPG evidence is **in fact** scientific evidence. Measurement of blood flow through the penis via a gauge is clearly a scientific process, much like measuring blood pressure via a blood pressure cuff is a scientific process.

Further, the court of appeals' reference to the State's reliance on the PPG 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).²⁰ 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 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 arguments focused on

²⁰ 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.

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).

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);
- 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 a well-documented 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, the DMH evaluator 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 results because they were consistent with the factors she considered in reaching her diagnosis (Appendix, pp. 193-194);
- 5) On cross-examination, the DMH evaluator 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);

6) Respondent also told the DMH evaluator 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 is 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 the DMH evaluator's opinion on that issue was essentially based on Respondent's self-serving statements during the interview, even though he lied to her about some critical and very relevant 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 established he has a sustained deviant interest in prepubescent children. During his evaluations with both the DMH evaluator and Dr. Gottfried, however, Respondent claimed he was no longer sexually aroused by prepubescent children, even stating there was no risk he would reoffend. The DMH evaluator accepted his claim at face value, but Dr. Gottfried did not. When Dr. Gottfried confronted Respondent with his assessment results, he admitted sexually molesting three family members (a cousin and his two sisters), which had never been reported.²¹

²¹The DMH evaluator did not challenge Respondent about his statements denying any unreported sex offenses against family members, even in the face of his documented offenses against family members (his daughter and niece). The jury was free to consider that fact in determining the credibility of the DMH evaluator'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.²² 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] is," thereby tying the statement directly to research in the field, which the court of appeals overlooked or ignored.

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 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 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.

²²Judge 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, and those descriptions of the PPG are included in the articles that are cited herein.

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), that his sexual offending was caused by his mental abnormality (undisputed), that he has a sexual preference for prepubescent children (undisputed), and that the DMH evaluator'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 the DMH evaluator'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, if the Court finds it was error to admit the PPG evidence, the State submits the Court should find that admitting the PPG evidence was harmless error, reverse the court of appeals opinion, and reinstate the jury verdict finding that Respondent is a sexually violent predator beyond a reasonable doubt.

CONCLUSION

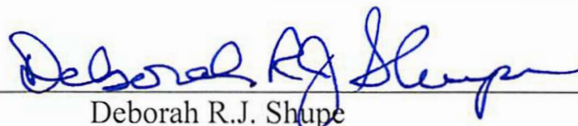
Based on the foregoing, and the matter set forth in the Final Brief of Respondent and the Petition for Rehearing, the State respectfully submits this Court should correct the court of appeals' errors by affirming Judge Henderson's ruling regarding admissibility of the PPG that was amply supported by 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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