

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Mar 14 2025

S.C. SUPREME COURT

Appeal from Spartanburg County
The Honorable R. Keith Kelly, Circuit Court Judge
On Certiorari to the Court of Appeals
Court of Appeals Appellate Case No. 2022-000371
Supreme Court Appellate Case No. 2024-001707

IN THE MATTER OF THE CARE AND TREATMENT OF
SHAWN TORLIF DAILY,

RESPONDENT.

BRIEF OF PETITIONER STATE OF SOUTH CAROLINA

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

Office of the Attorney General
Post Office Box 11549 Columbia,
SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Table of Authorities ii

Question Presented..... 1

Statement of the Case.....2

Statement of Facts3

Standard of Review 18

Argument 19

 The court of appeals erred in reversing Judge Kelly’s admission of the PPG evidence because it applied an incorrect standard of review, and disregarded Judge Kelly’s careful and meaningful exercise of his discretion, as well as the undisputed 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.....19

Conclusion..... 44

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Donaldson v. Central Illinois Public Service Co.</u> , 767 N.E.2d 314 (2002)	29
<u>In re Care and Treatment of Bilton</u> , 432 S.C. 157, 851 S.E.2d 442 (Ct .App. 2020)	20, 22, 23, 28, 29, 30
<u>In re Care & Treatment of Ettel</u> , 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008)	41
<u>In re Care and Treatment of Corley</u> , 353 S.C. 202, 577 S.E.2d 451 (2003).....	41
<u>In re Care and Treatment of Harvey</u> , 355 S.C. 53, 584 S.E.2d 893 (2003)	35
<u>In re Care and Treatment of Ridley</u> , 433 S.C. 316, 858 S.E.2d 165 (Ct. App. 2021)	22
<u>In re Care and Treatment of Taft</u> , 413 S.C. 16, 774 S.E.2d 462 (2015)	41
<u>In re Commitment of Sandry</u> , 367 Ill.App.3d 949, 857 N.E.2d (2006).....	28, 29, 31
<u>In re Detention of Halgren</u> , 156 Wash. 2d, 132 P.3d 714 (2006)	27, 28, 29
<u>In re Detention of Herrick</u> , 198 Wash. App. 439, 393 P.3d 879 (2017).....	27
<u>Johnson v. Horry County Solid Waste Auth.</u> , 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010)	18
<u>Lee v. Bunch</u> , 373 S.C. 654, 647 S.E.2d 197 (2007).....	18
<u>Morris v. BB&T Corp.</u> , 438 S.C. 582, 885 S.E.2d 394 (2023)	21, 23
<u>State v. Chavis</u> , 412 S.C. 101, 771 S.E.2d 336 [2015]	18
<u>State v. Council</u> , 335 S.C. 1, 515 S.E.2d 508 (1999).....	3, 19, 21, 22
<u>State v. Davis-Kocsis</u> , 443 S.C. 127, 903 S.E.2d 491 (2024).....	21
<u>State v. Graham</u> , 275 Kan. 176, 61 P.3d 662 (2003).....	38
<u>State v. Gray</u> , 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014).....	35
<u>State v. Heller</u> , 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012).....	35

<u>State v. Jackson</u> , 384 S.C. 29, 681 S.E.2d 17 (Ct. App. 2009).....	18, 21
<u>State v. Jones</u> , 343 S.C. 562, 541 S.E.2d 813 (2001)	19, 20, 22
<u>State v. Lyles</u> , 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008).....	18
<u>State v. McFarlane</u> , 279 S.C. 327, 306 S.E.2d 611 (1983).....	35
<u>State v. Phillips</u> , 430 S.C. 319, 844 S.E.2d 651 (2020).....	23, 31
<u>State v. Prather</u> , 429 S.C. 583, 840 S.E.2d 551 (2020).....	18, 21
<u>State v. Wallace</u> , 440 S.C. 537, 892 S.E.2d 301 (2023)	18, 21, 23
<u>United States v. Weber</u> , 451 F.3d 552 (9th Cir. 2006)	29
Rules	
Rule 403, SCRE.....	18
Rule 702, SCRE.....	20
Rule 703, SCRE.....	20
Other Authorities	
(501(k) Summary – Limestone Technologies, Inc. https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf	32
<u>About the Penile Plethysmograph</u> (2025) [https://arizonaforensics.com>about-the-penile-plethysmograph-new] (2025).....	32
Bickle, A., Et al., <u>International overview of phallometric testing for sexual offending behaviour and sexual risk</u> , BJPSYCH International, Vol. 8, No. 4, p. 11 (November 2021).....	31
Blue Cross Blue Shield of Texas, Treatment of Male Sexual Dysfunction, Special Comment on Contract Exclusions (January 7, 2003)	32
Burke, W. & Murphy L., <u>International Collaboration: The Development of the Real Child Voices Stimulus Set</u> , Keynote Address – International Academy of Sex Research Annual Meeting (July 2017).....	30
Diagnostic and Statistical Manual, 5th Ed., (DSM-5).....	6, 8, 24, 32
Diagnostic Statistical Manual, 5 th Ed., Text Revision (2022) (DSM 5 - TR).....	32

Federal Register Volume 72, Number 61, Addendum III and Addendum V (Friday, March 30, 2007)	32
Golde, J.A., et. al., <u>Psychophysiologic Assessment of Erectile Response and Its Suppression as a Function of Stimulus Media and Previous Experience with Plethysmography</u> , Journal of Sex Research, 37(1), 53–59 (2000)	30
Gottfried, E., et. al., <u>Examining Relationships Between PPG Stimuli and a Visual Reaction Test of Sexual Interest</u> , 40th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers Presentation (September 2021).....	31
Gottfried, E., <u>Use of Penile Plethysmography in Evaluations with Individuals Who Commit Sex Offenses</u> , South Carolina Chapter of the Association for the Treatment of Sexual Abusers Annual Conference Presentation (March 2019)	30
Howes R. J. & Howes, S. E., <u>Sexual Arousal as a Function of Stimulus Mode: Implications for Phallometric Assessment</u> , J. Forensic Res. 8(6):398 (2017).....	31, 33
Howes, R.J., <u>Measurement of Risk of Sexual Violence Through Phallometric Testing</u> , Leg Med (Tokyo) 11 Suppl 1:S368-369 (April 2009).....	31, 33
Kalmus, Beech, <u>Forensic Assessment of Sexual Interest: A Review</u> , Aggression and Violent Behavior. Vol. 10 Issue 2, pp. 193–217 (2005)	30
Letourneau, E.J., <u>A Comparison of Objective Measures of Sexual Arousal and Interest: Visual Reaction Time and Penile Plethysmography</u> , Sex Abuse 14(3), 207-23 (July 2002)	30
Marshall W. L., <u>Phallometric Assessments of Sexual Interests: An Update</u> , Current Psychiatry Rep. 16(1):428 (Jan. 2014)	30
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).....	30
Murphy, L., Bradford, J. M., & Fedoroff, J. P., <u>Laboratory Measurement of Penile Response in the Assessment of Sexual Interest</u> , Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues, 159 (2021).....	31
Murphy, L., <i>et al.</i> , <u>Assessment of Problematic Sexual Interests with the Penile Plethysmograph: an Overview of Assessment Laboratories</u> , Current Psychiatry Reports 17(5):567 (2015).....	31
Murphy, L., <i>et al.</i> , <u>Standardization of Penile Plethysmography in Assessment of Problematic Sexual Interests</u> , J. Sex. Med. 12(9): 1853-1861 (2015)	31

Penile Plethysmography (PPG): Measuring Sexual Arousal, November 16, 2024
[<https://chinnurology.com/penile-plethysmography/>] (Nov 16, 2024)..... 31

Penile Plethysmography: Measuring Man’s Sexual Arousal, March 22, 2024
[<https://www.icliniq.com/articles/men’s-health/penile-plethysmography>]
(March 22, 2024) 31

Peters, James M., Assessment and Treatment of Sex Offenders: What Attorneys
Need to Know, Advocate, 23 (Dec. 1999)..... 33

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) 6, 24, 30

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)..... 30

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)..... 33

QUESTION PRESENTED

Did the court of appeals err in reversing Judge Kelly's admission of the PPG evidence because it applied an incorrect standard of review, and disregarded Judge Kelly's careful and meaningful exercise of his discretion, as well as the undisputed 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?

STATEMENT OF THE CASE

In March 2022, a jury found beyond a reasonable doubt that Respondent Shawn Torlif Daily is a sexually violent predator as defined by the Sexually Violent Predator Act (SVPA), and he was committed to the Department of Mental Health (DMH) for long term control, care and treatment. The court of appeals reversed the jury verdict by published opinion filed June 12, 2025, finding Judge Kelly erred by allowing the State's expert to testify regarding a penile plethysmograph (PPG) performed during Respondent's evaluation. The State petitioned for 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 2010, Respondent Shawn Torlif Daily pled guilty in Spartanburg County to three counts of lewd act on a minor, and was sentenced to fifteen years incarceration on each count, suspended upon service of ten years and five years probation. Prior to Respondent's release from incarceration, Petitioner State of South Carolina commenced proceedings pursuant to the SVPA seeking Respondent's commitment to DMH for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on March 14, 2022, before the Honorable R. Keith Kelly, 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, and the State filed a Memorandum in Opposition to the Motion. (Appendix pp. 414-436). Before swearing the jury, Judge Kelly conducted a full evidentiary hearing pursuant to State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), during which Emily Gottfried, Ph.D., of the Medical University of South Carolina (MUSC) and the Director of the MUSC Sexual Behavior Clinic and Lab (SBCL), was qualified as an expert in forensic psychology. By stipulation, Dr. Gottfried was also specifically qualified as an expert on the PPG, and she was the sole witness at the Council hearing. (Appendix p. 20).

Pre-Trial Testimony and Ruling

Dr. Gottfried testified she is an Associate Professor of Psychiatry and Behavioral Sciences at MUSC, and the Director of MUSC's SBCL. In her capacity as Director, she oversees all SBCL administrative duties, and performs most of the forensic evaluations. She sits on the Executive

Committee of the Association for Treatment of Sexual Abusers (ATSA),¹ chairs the ATSA Research Committee, and is president-elect of the American Psychological Association Division 12 (clinical psychology) Assessment Section. She is a member of the South Carolina Association for the Treatment of Sexual Abusers, the American Psychological Association, the American Academy of Forensic Sciences, the Society for Personality Assessment, and other professional associations. She is also part of an international standardization research group focusing on the PPG. (Appendix, pp. 21-23).

Dr. Gottfried testified she has approximately thirty-six peer-reviewed publications or book chapters in peer-reviewed scholarly books. She has presented over sixty times at professional conferences, and gives trainings and webinar presentations for national and international universities. Four or five of her peer-reviewed publications and ten to twelve of her conference presentations related specifically to the PPG. During her tenure at MUSC, Dr. Gottfried has requested PPGs in approximately fifty-two evaluations for SVPA cases, private pre-trial matters, federal probation of sex offenders, and licensing board cases. (Appendix, pp. 23-24).

Consistent with best practices in the field, Dr. Gottfried conducts a comprehensive evaluation that includes data from multiple sources. She reviews the person's criminal and sex offense history and all collateral information, including mental health records, medical records, detention center and prison records. She also conducts a battery of psychological and physiological assessment measures, including the PPG, and scores the results on clinical rated assessment measures to look for risk factors and other factors to guide her clinical opinion. She then conducts a clinical interview with the person based on all the information she gathered from these sources. (Appendix, p. 25).

¹ATSA is now the Association for the Treatment and Prevention of Sexual Abuse.

Limestone Technologies, which developed and manufactured the PPG system used at MUSC, trained and certified Dr. Gottfried to conduct and interpret PPG results. The training includes classroom/online instruction on the history, background and literature of the PPG. After those classes, Limestone conducts multi-day day training sessions requiring actual administration and interpretation of PPGs in real time. Before certification, Limestone requires submission of PPG results that are reviewed for accuracy. The SBCL has been certified as both a clinical and a research laboratory. (Appendix, pp. 26).

Dr. Gottfried testified a PPG is only one data point she considers for evaluation purposes, but it is important because sexual arousal to nonconsensual or abusive stimuli is a strong predictor of sexual recidivism. People being evaluated may not be forthcoming about their sexual arousals, and the PPG provides an objective measure of male sexual arousal. It specifically measures whether they have a greater or equal level of arousal to deviant stimuli as they do to consenting adult scenarios. The PPG has been peer-reviewed in both the sex offender and general sexual behavior literature. (Appendix, pp. 27-29).

All SBCL personnel involved in the PPG process are clinically certified to conduct their part of the PPG, and the SBCL has a standard protocol used in every PPG performed there. The gauge used in a PPG must be calibrated three times before the PPG can start. The PPG equipment and software includes countermeasures in the event the person does something that might interfere with the PPG results, *i.e.*, moving around, changes in breathing pattern, not paying attention, etc. The person is not required to masturbate before the PPG begins or allowed to touch his penis during the PPG, which would show up on the PPG and invalidate it. The SBCL uses a very conservative cut score of 5mm change in penis circumference for significant arousal, while Canadian labs use a cut score of 1.5mm. (Appendix, pp. 30-33).

ATSA Practice Guidelines reference the PPG in multiple places, stating that research supported assessment methods such as the PPG may provide objective behavioral data that may not be readily established through other means, and the Guidelines support the responsible use of the PPG as a data point in sexual behavior evaluations and treatment. Dr. Gottfried stated “responsible use” means you do not administer a PPG in the absence of any other data and then base an opinion regarding diagnosis or risk solely on the PPG results. (Appendix, pp. 33-35).

Dr. Gottfried testified the Diagnostic and Statistical Manual, 5th Ed., (DSM-5) recognizes use of the PPG. She further testified that a book published in 2019 entitled “Sexually Violent Predators: A Clinical Science Handbook,” includes a chapter (Chapter 15) entitled “The Use of Penile Plethysmography in SVP Assessment and Treatment Decision-Making,” written by Dr. Joseph Plaud, who is an expert on the PPG. Dr. Plaud determined the PPG is important in both the evaluation and treatment of individuals convicted of sex offenses and being considered for civil commitment as a sexual predator. Dr. Gottfried testified the PPG is generally accepted in the mental health and medical fields. (Appendix, pp. 36-40).

Dr. Gottfried acknowledged that standardization of the PPG is an on-going issue arising primarily from the fact that some countries can do things other countries cannot do, and there are on-going efforts to formulate international standards. Canada uses stimuli that include nude children, which labs in the United States cannot use, and countries do not want to change their methods just for purposes of international standardization. (Appendix, pp. 40-41).

Dr. Gottfried testified it has been noted in some literature that the PPG does not always have expected results, i.e., someone with known offenses against children do not always show arousal to stimuli involving children during a PPG. She stated men who sexually offend against children may do so for multiple reasons that are not due to sexual arousal to prepubescent children,

so it would be expected that they would not show sexual arousal to children on a PPG. A 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 a “staggering” ability of the PPG to discriminate between the group of men who had offended against children and other groups. (Appendix, pp. 41, 47-48).

The SBCL uses a very conservative cut score of 5mm increase in penis circumference to measure significant sexual arousal to a stimulus trial, which minimizes the possibility of false positive results. It also utilizes two stimulus sets, the Marshall set and the Real Child Voices (RCV) set.² Dr. Gottfried testified the Marshall set was developed a long time ago, and features a monotone male voice reading sexual scenarios featuring prepubescent, pubescent, adult and neutral stimuli, with coercion, persuasion, sexual violence and consenting adults. The RCV uses visual plus audio stimuli trials, which large meta-analysis studies show to be the best stimuli, and it includes actors’ voices and sound effects featuring prepubescent, pubescent, adult, coercion, persuasion and neutral stimuli. Both sets are tailored to the person’s offending patterns, but all tests include the neutral and consensual adult stimulus trials. (Appendix, pp.41-45).

Dr. Gottfried testified all PPG systems sold by Limestone include the RCV stimulus set, and between fifty and one hundred labs in the United States and Canada use it. The RCV set is also used in the sexually violent predator treatment programs in Minnesota, California, Illinois, New York and Missouri. (Appendix, pp. 45-46). The SBCL uses both the Marshall set and the RCV set in order to gather as much data as possible, and while the Marshall set has been used and studied for a long time, the literature suggests visual plus audio stimuli has the highest reliability.

²The Marshall and RCV are stimulus sets. The individual scenarios in the sets are trials.

(Appendix, p. 47). The RCV stimulus set has been peer-reviewed, and studies of it have been peer-reviewed and approved for presentation at professional conferences. (Appendix, pp. 49-50).

Regarding Respondent specifically, Dr. Gottfried testified all the evaluators diagnosed him with pedophilic disorder, sexually aroused to female children, exclusive type, but Respondent never admitted he was sexually aroused by children. The psychological assessment measures Dr. Gottfried used indicated Respondent tried to “self-preserve” and not admit any flaws within himself, so his self-report regarding his sexual arousal might not be as valid as someone who was not defensive. The PPG was important to help determine whether Respondent was currently sexually aroused by children and had no strategies to mitigate his arousal. (Appendix, pp. 50-53).

On cross-examination, Dr. Gottfried confirmed the PPG is part of the SBCL’s standard battery of tests and assessments performed in every evaluation of adult males sent to the lab for evaluation and/or treatment. The lab uses the PPG because it provides physiological data regarding the person’s sexual arousal patterns. (Appendix, pp. 55-57).

Dr. Gottfried again testified the Marshall stimulus set has been used for a long time, and the SBCL uses a combination of the Marshall and the RCV stimulus sets. She stated Dr. Bill Burke, of Summerville, SC, and Musolf (not affiliated with MUSC) developed the RCV set. Dr. Burke has a volunteer faculty appointment at MUSC, and Dr. Gottfried collaborates with him. When asked if Dr. Burke makes a profit off the RCV sets sold, Dr. Gottfried testified: “I would assume so. I’m not privy to that.” (Appendix, pp.59-62).

Judge Kelly took the matter under advisement. After jury selection the next day, Judge Kelly discussed the Council factors in determining whether to admit scientific evidence. On the issue of peer-review, Judge Kelly found the PPG has been peer-reviewed and the subject of numerous publications, including the DSM-5. (Appendix, pp. 143-144).

Judge Kelly further found the PPG is used in over fifty laboratories throughout the United States and some international labs. While there are different standards for some countries, Judge Kelly found there is a standard application of the PPG in the United States. (Appendix, p. 144).

As to the quality control factor, Judge Kelly found the standards Dr. Gottfried testified about met the requirement, including the use of a conservative threshold that errs on the side of false negative results rather than false positive results. Dr. Gottfried's testimony regarding how the PPG is administered in the SBCL also satisfied the quality control requirement. (Appendix, pp. 144-145).

Judge Kelly found Dr. Gottfried's testimony established the PPG methodology was consistent with recognized laws and procedures. Specifically, the SBCL uses standard instructions provided by the system manufacturer and employs methods to prevent manipulation of the PPG data. Based on his findings, Judge Kelly found the PPG evidence was admissible, and Respondent's arguments went to the weight of the evidence, not its admissibility. (Appendix, pp. 145-146).

Trial Testimony

Dr. Gottfried

Before the jury, Dr. Gottfried was qualified as an expert in forensic psychology and sexual offending behavior. She testified about her qualifications and the protocol she follows in conducting pre-commitment evaluations under the SVPA. (Appendix, pp. 173-182).

In conducting Respondent's evaluation, Dr. Gottfried reviewed police and court documents related to his sex offenses, records related to Respondent's incarceration, Respondent's criminal history report, and the report from the initial evaluation conducted by a DMH evaluator. She stated these are the type of records typically relied on by experts in her field. (Appendix, pp. 184-185).

Dr. Gottfried testified an individual's past behavior is the best predictor of future behavior, and for purposes of recidivism risk, it is important to look at the characteristics of prior offenses, including the facts of the offenses and victim characteristics, to determine if there is a pattern of behavior. She stated she considers all criminal offense allegations as a data point, and allegations that did not result in convictions do not get as much weight, but all of it is important for purposes of a possible diagnosis. As to Respondent, Dr. Gottfried found it significant he did not have a nonsexual criminal history, and his criminal sex offenses were restricted to prepubescent females. (Appendix, pp. 185-187).

According to records Dr. Gottfried reviewed, Respondent was convicted in 2010 of three counts of lewd act with a child under the age of sixteen. The offenses occurred in 1992 or 1994, between 2002-2006 and approximately 2006-2008. He was also charged in 2010 with another lewd act offense, but pled guilty to assault and battery of a high and aggravated nature on that charge. Dr. Gottfried testified it is necessary to examine the underlying behavior behind the convictions as part of assessing whether there is a pattern of conduct that may indicate the person has a mental abnormality or personality disorder. (Appendix, pp. 187-193, 525-533).

The offense records indicated the mother of a victim in one of the 2010 convictions (Z.G.) was an acquaintance of Respondent. Z.G. was six to seven years old at the time of the offenses in 1999, but did not disclose anything until 2008. She reported Respondent sexually touched and hurt her in various ways, including exposing himself to her, asking her to sit on his penis, waking up in Respondent's bed with no clothes on, putting his hand down her pants and rubbing her, and washing her between her legs very slowly while bathing her. When interviewed by law enforcement, Respondent said he did not remember anything like what the victim reported, but he attempted suicide two days after that law enforcement interview. Dr. Gottfried testified this began

a pattern of Respondent offending against prepubescent female children by assuming a caretaker role and using some grooming behaviors. (Appendix, pp. 193-195).

When Dr. Gottfried questioned Respondent about the Z.G. offenses, he initially said all he remembered was an allegation that he rubbed Z.G.'s buttocks underneath her underwear. He then stated he was taking Ambien (sleeping medication) at the time, and he did not know if or when anything occurred, but he had "no doubt of their allegations." (Appendix, pp. 196-198).

Another of Respondent's 2010 convictions involved the daughter (S.B.) of a woman Respondent described as his female best friend. In 2006, when S.B. was approximately six years old, it was reported to law enforcement that Respondent inappropriately touched S.B. at the YMCA, but S.B.'s mother refused to allow law enforcement to interview S.B., so no charges were filed at that time. S.B. subsequently told her mother Respondent sat on the couch naked with a blanket over his lap and had S.B. sit on his lap and she could feel his penis. S.B. further disclosed that when she was with Respondent, he insisted on bathing her and would rub her chest while she was in the tub. S.B.'s mother confronted Respondent, who denied the allegations, and all contact between the mother, S.B. and Respondent ceased. In 2008, S.B.'s mother reported the abuse, which occurred from 2002 to 2006. (Appendix, pp. 198-200).

Respondent told Dr. Gottfried that he babysat S.B. every three to four months and he kept S.B. at his house or took her to the YMCA pool because her mother wanted her to learn how to swim. He stated that when they were at the pool, he helped S.B. put on or take off her bathing suit, and on one occasion S.B. leaned back and her hand touched his penis over his clothing. He again stated he had Ambien in his system and could not recall if he had an erection at that time. He denied the allegation that he sat on the couch naked, stating he had "never been unclothed around [S.B.] consciously," but he pled no contest to the charges because he had no way to refute

the allegations and could not say if it did or did not happen. Dr. Gottfried found the details significant because Respondent offended against a child while he was in a caretaking role, the child's mother was his "best friend," he groomed the child, and he blamed the offenses on not being in his right mind. (Appendix, pp. 200-203).

Respondent was also convicted of lewd act on a minor in connection with offenses against a third victim (B.H.) (Appendix, pp. 531-533). According to records, B.H.'s mother dated Respondent for seven years, and he met B.H. when she was four years old. B.H.'s mother reported that she and Respondent were never physically intimate during their seven year relationship. In 2009, the mother informed law enforcement that Respondent molested B.H. between 2006 and 2008 by digitally penetrating her vagina and rubbing her back in her "private area." When Dr. Gottfried asked Respondent about the allegations, he stated he had little recollection or memory because of taking more Ambien than he should have, and he could not refute the allegations. Dr. Gottfried found this offense significant because it involved another minor Respondent had access to through a relationship with the minor's mother, and Respondent assumed a caretaker role for the minor. (Appendix, pp. 203-207).

Respondent was charged with lewd act on a minor arising from an incident in 1994 or 1995 involving a four-year-old victim (B.J.) that was reported in 2009, and he pled guilty in 2010 to assault and battery of a high and aggravated nature on that charge. Records indicated Respondent knew B.J. because he had worked with her mother, and when B.J. was in the bathroom, Respondent touched her vagina and put her hand on his penis. When questioned by law enforcement in 2009, Respondent stated he had no memory of going to the location where the molestation occurred. Dr. Gottfried testified B.J. was Respondent's first victim, and the incident started Respondent's fifteen

to seventeen year pattern of offending against prepubescent females he had access to via relationships with their mothers. (Appendix, pp. 207-210).

Dr. Gottfried also reviewed the mental health evaluation report by the DMH evaluator, and noted the DMH evaluator used the same risk assessment measures she used and got the same results she did. The DMH evaluator determined Respondent had certain risk factors, including sexual preference for prepubescent children, a lack of emotionally intimate relationships with adults, emotional congruence with children, and some offense supportive attitudes. The DMH evaluator also diagnosed Respondent with pedophilic disorder, but concluded he did not meet the criteria for civil commitment under the SVPA. (Appendix, pp. 210-212).

Dr. Gottfried then testified about the battery of tests and assessments she performs as part of her evaluation, which includes a self-report computer test, physiological measures and clinician scored assessments that consider everything learned about the person being evaluated. This battery of tests and assessments provides multiple data points regarding psychological functioning, mental health history, symptom history, sexual interest, substance abuse, and sexual behaviors. Dr. Gottfried stated the tests and assessments she uses are the type of tests and assessments other experts in her field utilize and reasonably rely on in rendering opinions. She further stated it is very important to have multiple data points as a basis for any opinion, and it would be unethical to base an opinion on one data point. (Appendix, pp. 212-215).

Dr. Gottfried testified the self-report test results indicated Respondent presented a defensive style response about his own interest in sex and had a “really high level of denial related to past sexual interest or urges and things that might be considered deviant.” Respondent’s responses suggested he tried to paint himself in an overly positive light with an unwillingness to disclose minor faults in himself. On one test, Respondent disclosed that from the age of 27-34, he

molested children three times with three different victims he identified as female neighbors or acquaintances between the ages of four and thirteen. When Dr. Gottfried discussed the test results with Respondent, he agreed with the results, but noted he had exposed himself to a fourth victim (the four-year-old female victim B.H.). (Appendix, pp. 215-217).

The test responses indicated Respondent placed responsibility for his conduct on having too much alcohol or drugs and his use of pornography. The tests also noted Respondent likely lacks sexual interests in adult women. Further Respondent indicated he knew it was wrong to engage in sexual activity with minors, but he attempted to explain away his conduct by indicating he was messed up, and he then minimized his behavior by indicating he did not plan the actions and did not know how the sexual things happened. (Appendix, pp. 217-218, 224-225).

After Judge Kelly affirmed his pre-trial ruling regarding the reliability and admissibility of the PPG, Dr. Gottfried testified about the PPG generally, research regarding the utility of the PPG in psychosexual evaluations, and the protocols MUSC utilized for all PPGs. (Appendix, pp. 221, 226-227). As to Respondent's PPG, Dr. Gottfried stated "he had clinically significant sexual arousal to trials featuring sexual activity with a female infant, a preschool-aged female child, and a grammar school or elementary school-aged child," which were consistent with his offense behaviors. (Appendix, pp. 237-239).

Dr. Gottfried testified that when she went over the PPG results with Respondent, he said he was really tense during the PPG, and during the trials involving children he became more tense and was mad at the aggressor in the trials. He told Dr. Gottfried he "didn't feel aroused" during the trials. (Appendix, pp. 238-239).

Dr. Gottfried diagnosed Respondent with pedophilic disorder, exclusive type, sexually aroused to female prepubescent children. She explained her diagnosis was based on the facts of

Respondent's sex offenses, which showed he was sexually aroused by prepubescent females, and the PPG demonstrated Respondent was currently aroused by prepubescent children. (Appendix, pp. 239-246).

Dr. Gottfried then told the jury about actuarial risk assessments she completed, the Static-99R and the Static-2002R, and Respondent's scores on both assessments were in the average risk category when compared to other known sex offenders. She stated the assessments are based only on known reoffenders and studies indicate only approximately 30% of sex offenses are reported, so the assessments potentially underestimate a particular individual's risk to reoffend. (Appendix, pp. 246-253).

Dr. Gottfried testified she found Respondent had multiple dynamic risk factors for sexually reoffending that are not factored into the Static risk assessments. She determined Respondent's risk factors included sexual deviation, sexual health problems, preoccupation with sex and pornography, relationship problems, chronic sexual offending, extreme minimization or denial of sex offending, and possible use of psychological coercion in his offenses (grooming behavior). She stated Respondent had not received any sex offender treatment even though it was offered to him while he was incarcerated, and the lack of treatment was significant because pedophilia is a chronic condition and if Respondent could control it without treatment, he would not have multiple victims. She noted Respondent was able to refrain from committing other types of offenses, but repeatedly offended against prepubescent victims. (Appendix, pp. 253-259).

Dr. Gottfried also testified Respondent had no realistic strategies to manage his condition in the future, and nothing indicated he was going to be able to stop himself from reoffending. The future plans Respondent discussed with Dr. Gottfried included living with his parents, working with a pastor on rehabilitation and spiritual growth, and using the pastor for accountability,

counseling and support. Dr. Gottfried stated Respondent had family and community support while he was offending, so he had no new support system in place that might mitigate his risk. She opined to a reasonable degree of psychological certainty that Respondent had the mental abnormality of pedophilic disorder that makes him likely to reoffend sexually if not confined for long term control, care and treatment. (Appendix, pp. 259-265).

DMH Evaluator

The DMH evaluator was qualified as an expert in clinical forensic psychology, and testified DMH assigned him to conduct Respondent's initial evaluation. He also diagnosed Respondent with pedophilic disorder based on his criminal offense history. The DMH evaluator reviewed records regarding Respondent's criminal history and his incarceration, and used the same actuarial risk assessment tools Dr. Gottfried used, which placed Respondent in the average risk category. While acknowledging Respondent had dynamic risk factors for reoffending, the DMH evaluator concluded the risk factors could be targeted in treatment and Respondent had a support system to help him, so he did not need to be confined for treatment of his pedophilic disorder. (Appendix, pp. 303-325).

On cross-examination, the DMH evaluator testified he found Respondent has at least four dynamic risk factors not accounted for by the actuarial risk assessment tools, which included sexual attraction to prepubescent children, lack of emotionally intimate relationships with adults, emotional congruence with children, and offense supportive attitudes. When the DMH evaluator interviewed him, Respondent denied his pedophilic interests "were an ongoing area of need - - or an ongoing area of concern for him," but the DMH evaluator testified pedophilic disorder is a chronic condition and he believed Respondent "will always be attracted to children for the rest of his life." The DMH evaluator ultimately concluded that despite Respondent's diagnosis, dynamic

risk factors and history suggesting he has serious difficulty controlling his sexual deviance, Respondent did not meet the criteria for civil commitment under the SVPA. (Appendix, pp. 325-344).

In closing, the State argued Dr. Gottfried's evaluation was more thorough than the DMH evaluator's evaluation, and Dr. Gottfried had obtained more information on which to base an informed opinion. The State pointed out that both experts diagnosed Respondent with pedophilic disorder. Respondent also told both experts he did not currently have sexual interest in children, but the PPG confirmed the diagnosis and showed Respondent did have ongoing sexual interests in children. The State then went over all Respondent's dynamic risk factors for reoffending that both experts identified, and the additional risk factors Dr. Gottfried identified based on all the additional testing and information she gathered. (Appendix, pp. 360-376, 389-393).

Jury Verdict/Appeal

The jury found Respondent is a sexually violent predator beyond a reasonable doubt, and Judge Kelly ordered that he be committed to DMH custody for long term control, care and treatment. (Appendix, pp. 410-411). This appeal followed.

By published opinion filed June 12, 2024, the court of appeals, without oral argument, reversed Respondent's commitment, finding Judge Kelly erred in allowing the PPG testimony because the PPG is unreliable, and the error was not harmless. (Appendix, pp. 633-640). The State filed a Petition for Rehearing, raising issues regarding the appellate standard of review, the failure to properly analyze the PPG evidence presented to Judge Kelly, and the court of appeals' erroneous harmless error analysis. (Appendix, pp. 641-655). The court of appeals denied the State's petition, and this Court granted the State's petition for a writ of certiorari to the court of appeals to review the court of appeals' decision by Order filed 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 Kelly's admission of the PPG evidence because it applied an incorrect standard of review and disregarded Judge Kelly's careful and meaningful exercise of his discretion, as well as the undisputed 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.

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 undisputed evidence in the record and failed to apply the appropriate standard of review on appeal. In particular, during a circuit court hearing, consistent with this Court's standards as set forth in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), and Council the State presented undisputed expert scientific evidence that supports Judge Kelly's findings and ruling regarding the PPG methodology, reliability and admissibility as it related to the expert's opinion on the question of whether Respondent is a sexually violent predator under South Carolina law.

The court of appeals' apparent *de novo* determination regarding PPG reliability and admissibility failed to recognize and give due deference to the findings and legal conclusions of Judge Kelly after a full evidentiary hearing. The court of appeals decided the case without oral argument and disregarded the substantial undisputed evidence in the record regarding the general reliability and acceptance of the PPG, as well as the multiple scholarly publications and presentations cited in the State's brief. The court of appeals then compounded the error by applying a fundamentally flawed harmless error analysis. The State raised these issues in its Petition for Rehearing.

The court of appeals opinion in this case is the first published opinion in South Carolina

expressly finding the PPG is unreliable and evidence regarding it is inadmissible, a conclusion the court of appeals reached through impermissible *de novo* review. 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 court of appeals found Judge Kelly erred in admitting Dr. Gottfried's testimony regarding the PPG conducted as part of her comprehensive psychosexual evaluation of Respondent's mental status and risk to reoffend, finding there was no evidence the PPG is reliable. As support, the court of appeals primarily relied on dicta from In re Care and Treatment of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct .App. 2020), while ignoring undisputed evidence before Judge Kelly about the extensive research about the PPG and its general acceptance in the mental health and medical fields.

Rule 702, SCRE, provides that expert opinion testimony is admissible if it will assist the trier of fact to understand evidence or determine a fact in issue. Rule 703, SCRE, provides that facts or data on which an expert bases an opinion or inference perceived by or made known to the expert need not be otherwise admissible in evidence if the facts or data are of a type reasonably relied on by experts in the particular field.

In considering the admissibility of scientific evidence, the court looks at several factors, including: (1) the publications and peer-review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Jones, 343 S.C. 562, 541 S.E.2d 813, 819 (2001). This type of evidence is

also subject to attack for relevancy and prejudice, and once the evidence is admitted, the jury may give it such weight as it deems appropriate. Council, 515 S.E.2d at 517-518.

The admission or exclusion of evidence is a matter within the trial court’s sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing the trial court’s rulings were based on an error of law or were unsupported by evidence in the record. Prather, 840 S.E.2d at 559 (2020); Jackson, 681 S.E.2d at 19; *see also* State v. Davis-Kocsis, 443 S.C. 127, 903 S.E.2d 491 (2024) (S.C. Sup. Ct. filed June 26, 2024) (appellate court’s standard of review regarding evidentiary rulings is “simply to determine whether the trial court acted within its discretion,” and “[i]f so, we affirm”). The exercise of discretion means “the trial court—when ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it.” 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]).

The trial court’s recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process; and when a trial court’s thought process of applying sound principles of law to the court’s view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court’s exercise of discretion, even when the judges on the appellate court might have made the decision differently. Morris at 397. Trial courts are tasked only with determining whether the basis for the expert’s opinion is sufficiently reliable such that it may be offered into evidence, and vigorous cross examination, presentation of contrary evidence and careful instructions on the burden of proof are the traditional appropriate means of attacking

admissible evidence. In re Matter of Ridley, 433 S.C. 316, 858 S.E.2d 165, 168-169 (Ct. App. 2021).

Before the court of appeals, Respondent contended Judge Kelly erred in admitting Dr. Gottfried's testimony regarding the PPG because there was no evidence the PPG is reliable, and its admission was more prejudicial than probative. The court of appeals agreed, relying on dicta from Bilton and outdated authorities and cases.

In reaching its conclusions, the court of appeals applied a *de novo* standard of review rather than the appropriate abuse of discretion standard of review. The court of appeals' *de novo* review ignored significant undisputed evidence regarding the PPG's reliability and its admissibility as a factor considered by the State's expert in formulating her opinion, as well as the numerous peer-reviewed publications and presentations regarding the PPG that were cited in the State's brief.

Even though the court of appeals cited the appropriate abuse of discretion standard of review, it reversed Judge Kelly's conclusions with no analysis of the evidence before him, much less his detailed findings on each Jones/Council factor with reference to the specific evidence on which he relied.³ The court did not find any of Judge Kelly's findings and conclusions lacked evidentiary support and cited no error of law, but in a conclusory fashion, overlooked the extensive evidence before Judge Kelly regarding the reliability of the PPG, particularly in relation to the Jones/Council factors.

It is clear from the record that Judge Kelly recognized his responsibility to exercise his discretion regarding admissibility of PPG evidence, and he meaningfully engaged in exactly the deliberative process described in Wallace and Morris. Rather than fully analyze the evidence and

³Indeed, it is difficult to find anything in the court of appeals opinion indicating the court of appeals even read, much less considered, Judge Kelly's analysis, findings and conclusions.

Judge Kelly's findings, however, the court of appeals focused on one statement regarding standardization in Dr. Gottfried's in-depth pre-trial testimony, which it took out of context and only quoted in part. In essence, the court of appeals substituted its judgment for Judge Kelly's without finding abuse of discretion as to any of Judge Kelly's findings or conclusions. An appellate court's distaste for a particular scientific test or evidence is not a basis for overruling a trial court's comprehensive and well-reasoned analysis and ruling regarding the evidence's admissibility.⁴ See Morris; Wallace; 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).

During the pre-trial hearing, Dr. Gottfried was qualified by stipulation as an expert in the field of PPG technology. Her PPG testimony was undisputed, but the court of appeals dismissively summarized Dr. Gottfried's pre-trial testimony while ignoring the context or full content of her testimony.

Significantly, the court of appeals stated Dr. Gottfried had “about 36 peer-reviewed publications or book chapters in peer-reviewed scholarly books” regarding the PPG. She actually testified, however, that the PPG is the subject of “**over a hundred**” peer-reviewed studies and publications in the general sexual health and sexual offending literature, and there are “**over sixty**” peer-reviewed professional conference presentations regarding the PPG. (Appendix pp. 23-24) (emphasis added). In addition, the PPG is acknowledged in the DSM-5, and discussed at length

⁴Beginning 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.

in the “Sexually Violent Predators: A Clinical Science Handbook” as useful in the field of assessing people for civil commitment as sexually violent predators. (Appendix pp. 36-40). By ignoring or downplaying this evidence, the court of appeals avoided analyzing Judge Kelly’s finding regarding the PPG’s documented merits.

The court of appeals also noted Dr. Gottfried “opined that SVP programs in Minnesota, California, Illinois, New York and possibly Missouri use the [Real Child Voices] methodology for treatment programs.” Then, by way of footnote, the court of appeals stated Dr. Gottfried “mentioned” those jurisdictions used the PPG “for precommitment,” but her reference to “programs” only meant the treatment programs. While Dr. Gottfried did subsequently clarify that her reference to “programs” was to SVP treatment programs in those jurisdictions, she definitively stated that evaluators in those states also used the PPG for precommitment evaluations and annual reviews. (Appendix pp. 46, 68-69). In short, it was undisputed that the PPG is used in those jurisdictions for evaluations as well as treatment.

The court of appeals further stated (and then emphasized) that Dr. Gottfried “admitted the PPG had standardization issues,” but ignored the vital context of her testimony regarding standardization. Specifically, Dr. Gottfried testified:

[S]tandardization is an issue, and really what’s driving that is that other countries can do things that other countries can’t do. So, for example, my colleagues in Canada have been administering PPGs for at least 30 years, and they have been using the same stimuli for a very long time. That stimuli includes nude children, which we cannot use here in the U.S. And so, when I’m working with this international standardization group that I’m a part of, there’s a lot of discussion about them having to change things that they’ve been using for a long time that works for them just because now, when we’re trying to internationally standardize it, they don’t want to change their methods, because this is what works for them; they’re allowed to use it. So I’d say that’s probably the biggest criticism.

(Appendix pp. 32, 40-41) (emphasis added). Thus, rather than generally stating there are standardization issues with the PPG, Dr. Gottfried clearly indicated the standardization criticism

arises primarily from international differences between what labs in some countries can use as stimuli that labs in other countries cannot use. The fact that other countries may use different stimuli does not render the PPG technology unreliable for lack of standardization.

As to standardization between different stimulus sets, Dr. Gottfried testified the stimulus sets used in the United States are standardized, every lab using a particular stimulus set is using the standard set, and the RCV is being used in a substantial number of labs in the United States. On cross-examination, when asked if there was any standardization between different stimulus sets, Dr. Gottfried testified the stimulus sets are already produced, and the examiner hits a button to start the set. She then stated the stimulus sets “would be standardized because everybody that uses [a stimulus set] is using the same [stimulus set].” (Appendix, pp. 62-63).

Further, even if labs utilizing the PPG use different stimulus sets, the raw data generated by the PPG technology remains the same – an arousal is either present or it is not. The fact that labs may use different “cut scores” for significant arousals goes to the interpretation of the raw data, while the raw data remains the same. Dr. Gottfried testified she chooses to use a higher cut score (5mm) than the literature recommends (2.5mm) because of the high stakes involved in SVPA cases, and she would rather have false negatives (the person is aroused by a particular scenario but it does not show as significant on the PPG) than false positives (the person is not aroused by a particular scenario but shows a significant arousal on the PPG).⁵ Differences in which specific stimulus sets and cut scores are used by the interpreters are matters that can be explored on cross-examination and through testimony from other experts.

⁵An expert’s choice to use a cut score different from other labs for a particular reason that actually inures to the benefit of the person being evaluated does not obviate the reliability of the data being generated by the PPG. The expert’s decision to err on the side of caution in interpreting the PPG results in a high stakes evaluation should not serve to render the reliable, objective measure results inadmissible as a whole.

In addition, the court of appeals stated Dr. Gottfried “admitted” the PPG “did not always have expected results.” Again, the court of appeals ignored the context and full extent of Dr. Gottfried’s testimony on that issue. She testified:

Another [criticism] is that it’s been noted that the PPG doesn’t always have expected results. And so, for example, it’s been noted that somebody who had offenses against children, they don’t always show arousal while undergoing a PPG to children. And to me, I don’t understand that argument for a couple of different reasons, but the main one is, is that we know that people offend against children for numerous reasons. Arousal to children is only one of them. There are people who sexual (sic) offend against children who are not sexually aroused by children, and so you would expect that those people wouldn’t be aroused to children on the PPG.

(Appendix p. 41). On cross-examination, Dr. Gottfried reiterated “there’s been some commentary or criticism in the literature” that men who have offended against children do not always show sexual arousal to children on the PPG, but she again testified that having a paraphilic interest in children is only one reason people sexually offend against children, and if they offend for a non-paraphilic reason, they would not be expected to show paraphilic arousal on the PPG. (Appendix p. 67). In other words, Dr. Gottfried did not “admit” the PPG has unexpected results. To the contrary, she indicated such criticism is not well founded.

The court of appeals also truncated Dr. Gottfried’s PPG testimony before the jury, again reducing it to criticism regarding PPG standardization and expected results. As it did with the pre-trial testimony, the court ignored the context and full content of Dr. Gottfried’s testimony on those issues.

As discussed above, similar to her pre-trial testimony, Dr. Gottfried’s trial testimony explained what the PPG is and how it works, that there were international standardization issues, and explained why standardization between different countries is problematic. (Appendix pp. 232-233). As to the expected results issue, Dr. Gottfried stated some of “the literature” referenced unexpected PPG results related to people who sexually offend against children and do not show

arousal to child stimuli during the PPG, but “[t]here have been a lot of studies looking at the reliability of the PPG and its ability to differentiate between people who offended against children and people who haven’t,” and the big studies “really showed that the PPG has the greatest validity and reliability” “for people who are aroused by children.” (Appendix p. 233-237).

After testifying about the trials Respondent showed significant arousal to, Dr. Gottfried did state Respondent’s PPG results “were right in line with his offenses,” and his clinically significant arousal to trials featuring sexual activities with prepubescent females was “really consistent with his offense behaviors.”⁶ Significantly, however, she also testified about Respondent’s responses when she discussed the results with him, including that he “was disheartened” about them and said he did not feel aroused during the scenarios but was “tense” and “mad at the aggressor.” (Appendix pp. 237-239). That was the extent of her direct testimony about Respondent’s PPG.

Critically, the court of appeals recognized “there may be contrary authority finding the PPG is reliable and probative.” (emphasis added). The case law from Washington and Illinois that the court of appeals cited, however, definitively held, after extensive analysis, that the PPG is reliable and probative. *See In re Detention of Halgren*, 156 Wash. 2d, 132 P.3d 714 (2006) (PPG results were admissible as part of the diagnostic process, the PPG testimony would assist the jury in understanding the expert’s sexual deviancy diagnosis and the issue of the PPG’s reliability goes to the weight of the evidence rather than its admissibility); *In re Detention of Herrick*, 198 Wash. App. 439, 393 P.3d 879 (2017) (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).

⁶Respondent actually conceded the PPG results were “expected” because he is a pedophile (discussed below).

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. That dismissal of the Washington court analysis apparently continued in this case.

The Illinois appellate court also found PPG evidence was admissible in In re Commitment of Sandry, 367 Ill.App.3d 949, 857 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 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 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 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).

In Bilton, the court of appeals 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 of appeals’ 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.” Sandry 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 is generally accepted in the scientific community, the Sandry court necessarily considered “reliability,” and its discussion of evidence indicating the PPG is reliable and generally accepted is directly relevant here.⁷

Rather than consider the analysis in the cases holding the PPG is reliable, however, the court of appeals relied on dicta from Bilton stating the PPG is “controversial and has been criticized for a lack of standardization and for being subject to manipulation,” and incorrectly stating that courts have “uniformly” found PPG results are inadmissible due to a lack of accepted standards for the test in the scientific community. *Id.* at 444. The court of appeals also cited outdated case law and articles as support, while ignoring the extensive and more recent research, publications

⁷The Bilton court also cited a concurring opinion in United States v. Weber, 451 F.3d 552 (9th Cir. 2006) for the proposition that the PPG is “Orwellian when, **as here**, the State compels the subject to arouse himself sexually and then forces him to view deviant stimulants.” 851 S.E.2d at 444 (emphasis added). This statement is misleading and completely inaccurate. There was no evidence in Bilton, and there is no evidence in this case, that MUSC requires the person to “arouse himself sexually” before beginning the test. To the contrary, Dr. Gottfried expressly testified MUSC’s protocols do not include any masturbation requirement. (Appendix, pp. 30-31).

and presentations cited and discussed in the State's brief, none of which Respondent refuted or even challenged.

There is ample evidence the PPG is widely researched and generally accepted. *See* Golde, J.A., et. al., Psychophysiological 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); 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 assessing 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-plethysmorgraphy/>] (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.⁸

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.⁹ In addition, the Medicaid/Medicare regulations provide coverage for PPGs.¹⁰ 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.¹¹ 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.

⁸Indeed, 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).

⁹See 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.”).

¹⁰See 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>).

¹¹The 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>).

As Dr. Gottfried testified, 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 suggest 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.

DSM-5-R 699 (emphasis added).¹² 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.¹³

In psychosexual behavior evaluations, the PPG provides data useful is 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

¹²Sensitivity 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).

¹³Published 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 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.

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 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).

The record amply supports Judge Kelly’s findings regarding the reliability of the PPG and the admissibility of evidence regarding Appellant’s PPG results. Dr. Gottfried considered the PPG results as a single data point in a multi-faceted psychosexual evaluation, and without focusing on the PPG, she testified about **all** the tests and information she considered in reaching her opinions regarding Appellant’s pedophilic disorder diagnosis and his risk to reoffend sexually if not confined for long term control, care and treatment.

The court of appeals failed to apply the required abuse of discretion standard of review in this case, ignored substantial evidence in the record, and substituted its judgment for Judge Kelly’s well-reasoned ruling. Accordingly, the Court should reverse the court of appeals opinion, affirm Judge Kelly’s appropriate, careful and meaningful exercise of his discretion, and reinstate the jury verdict finding Respondent is a sexually violent predator beyond a reasonable doubt.

B. The court of appeals' harmless error analysis overlooked other overwhelming evidence that supported the jury's verdict, and it mischaracterized Dr. Gottfried's testimony before the jury.

Even assuming error, the court of appeals' harmless error analysis was fundamentally flawed. In determining the purported error in admitting the PPG evidence was not harmless, the court of appeals again focused on very limited testimony regarding the PPG without considering that testimony in context and in relation to the entirety of the evidence as required by well-established South Carolina case law.¹⁴

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).¹⁵ "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 the PPG reliability issue, the court of appeals set forth the correct harmless error standard, then failed to apply it. Rather than considering the PPG testimony during trial 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.

¹⁴The State does not concede error in the admission of the PPG evidence, rather, as set forth above, contends there was no error. This harmless error analysis is only in response to the court of appeals' harmless error analysis and conclusion.

¹⁵All evidence is meant to be prejudicial; only unfair prejudice must be scrutinized. *See State v. Gray*, 408 S.C. 601, 759 S.E.2d 160, 168 (Ct. App. 2014).

In finding admission of the PPG evidence was not harmless error, the court of appeals overlooked other, and indeed overwhelming, evidence in the record that more than supported the jury's verdict, even without any of the PPG evidence. Significantly, Dr. Gottfried and the DMH evaluator both diagnosed Respondent with pedophilic disorder, exclusive type, sexually aroused to female prepubescent children. They both based their diagnosis on Respondent's significant sex offense history against prepubescent females, and they both found Respondent had engaged in grooming behavior in his sex offenses. They both also found his sexual attraction to children was current and ongoing.

Both experts reached the same scores on the actuarial risk assessments, and agreed the scores put Respondent in the average risk to reoffend sexually category when compared to other routine sex offenders who had reoffended sexually, but that did not necessarily equate to an individual's actual risk. They both found Respondent had multiple dynamic risk factors for sexual reoffending. They both testified pedophilic disorder is chronic but can be treated. They both found Respondent needs treatment for his pedophilia. They both noted Respondent did not have any sex offender treatment even though he did have an opportunity to get it while he was incarcerated. (Appendix pp. 183-218, 240-265, 293-295, 309-318, 323, 325-342).

Thus, in terms of the SVPA statutory elements, both experts found Respondent has a mental abnormality that is causally connected to his sexual offending and makes him a risk to sexually reoffend if not treated. The only real point of demarcation between the experts' opinions was whether Respondent needed to be confined for the treatment he needs to control his pedophilic arousal and urges. The difference in their conclusions on this issue centered on what support system and accountability Respondent would have if released, which had nothing to do with the

PPG and did not go to Respondent's diagnosis, his need for treatment, or even his responses or urges; rather it was a factor completely separate from the psychological analysis.

Dr. Gottfried testified Respondent had acted on his sexual arousal to children, and "there's nothing that he has demonstrated or that has been done that suggests that he's going to be able [to] stop himself from acting on it again." She stated that Respondent planned to live with his family, get a job, and work with a pastor on rehabilitation and spiritual growth, but nothing indicated Respondent's support system might mitigate his risk to reoffend. She further stated Respondent "had no realistic strategies" to control his risk, and he did not know how to avoid reoffending. (Appendix pp. 260-264).

On cross-examination and re-direct examination, Dr. Gottfried testified she was aware Respondent had probation through January 2025, he would be required to wear a GPS device upon release, and it was likely his probation would require that he seek treatment. She stated she considered all those facts in her evaluation. Further, she stated the support system Respondent would have if released was essentially the same support system he had when he was offending. (Appendix pp. 284-286, 297-298).

The DMH evaluator testified Respondent did not need to be confined for treatment because he would be on probation and receive treatment, which would help him work on "things that are still problems for him," he would be monitored at home and by the justice system, and if he was unable to manage his "situation," he would be put in a more restrictive environment. He stated Respondent's parents would be "good supports for him in the community in a risk-relevant way," they would "help mitigate or lessen his risk in the community," and they recognized Respondent has "chronic problems that plague [Respondent]; that's lifelong."

On cross-examination, The DMH evaluator acknowledged Respondent “does have some treatment needs.” In spite of all his conclusions regarding Respondent’s need for treatment because his pedophilia is chronic, the DMH evaluator essentially dismissed the possibility of future victims by stating sex offense specific treatment would merely “come in handy.” (Appendix pp. 318-324, 340-342).

Respondent’s mother (one of Respondent’s critical support people) testified her husband (Respondent’s other critical support person) was 73 years old with health problems, including “forgetfulness,” and she has Parkinson’s disease. She stated she was willing to let Respondent live with her and her husband, and she was aware of the conditions of his probation. She subsequently acknowledged, however, that she could not control Respondent, and stated she would make Respondent leave her home and she would call the authorities if she knew Respondent did something he should not do. (Appendix pp. 350-355).

Unfortunately, the mother’s report to authorities would necessarily be after the fact of Respondent’s misconduct, and it cannot be ignored that if Respondent does “something wrong,” his history indicates that will mean he has victimized another innocent child. As a pedophile who is only attracted to minor females, Respondent will necessarily be around potential victims in the community without treatment, to learn effective strategies to control his pedophilic urges. There is no safety net between Respondent and children.

The jury heard from two experts who agreed on virtually everything except Respondent’s need to be confined for treatment. As noted above, neither expert’s opinion on that issue hinged in any way on the PPG results, and they did not even reference the PPG when explaining the basis for their opinions on the issue. Rather, their opinions focused on the sufficiency of Respondent’s support system if released.

Dr. Gottfried was aware of Respondent's probation requirements and his plan to live with his parents and explained why she thought that was inadequate to prevent Respondent from reoffending. The DMH evaluator's opinion was based on Respondent's probation, his parents' supervision, and the ability of the legal system to control Respondent's conduct. Significantly, the jury also heard Respondent's mother's testimony about the significant health issues of her Respondent's father, and her concession that she could not control Respondent even if he lived in her home, which undermined the DMH evaluator's analysis regarding the strength of Respondent's support and accountability system in the community.

The jury was free to accept or reject either expert's opinion on the issue of whether Respondent should be confined to receive the treatment both experts opined he needs. Even without the PPG evidence, there was more than sufficient, indeed overwhelming, evidence to support the jury's determination that Respondent has a mental abnormality (undisputed), his sexual offending was caused by his mental abnormality (undisputed), he needed treatment to help manage his current and on-going deviant urges and arousal (undisputed), and he needed to be confined for that treatment because his restrictions and community support were insufficient. In light of that evidence, any error in admitting the PPG evidence was harmless beyond any reasonable doubt.

Finally, the court of appeals made much of the fact that Dr. Gottfried was the State's sole witness, and it stated that "a significant portion of her testimony centered on the PPG." While it is true Dr. Gottfried was the State's only witness, classifying her PPG testimony as "a significant portion of her testimony" is misleading and inaccurate.

As to the extent and significance of Dr. Gottfried's PPG testimony, her direct testimony is on pages 168-265 (97 pages) of the Appendix, and her entire PPG testimony during the State's case is on pages 224-239 of the Appendix (15 pages - 15% of her entire testimony). The vast

majority of her PPG direct testimony (pages 224-237 – 13 pages) was devoted to explaining what the PPG is, describing the PPG machine and how it works, the standardization and expected results issues (which the court of appeals used to find the PPG is not reliable), and MUSC’s training and protocols for every PPG performed in its lab. Her testimony regarding Respondent’s PPG is found on pages 237-239 of the Appendix, for a total of two pages (2% of her entire direct testimony).

In short, eighty-two pages (85%) of Dr. Gottfried’s direct testimony was devoted to her credentials and evidence other than the PPG, including: the facts of Respondent’s sex offenses against prepubescent female children; the battery of psychological tests in her evaluation protocol; Respondent’s results on those tests; Respondent’s statements to her during the clinical interview; her diagnosis of pedophilic disorder, exclusive type, sexually aroused to female prepubescent children; the actuarial risk assessments she used and Respondent’s level of risk according to those assessments; Respondent’s dynamic risk factors for reoffending; Respondent’s need for treatment and lack thereof; Respondent’s support system in the community if released; and her ultimate opinion that Respondent met the criteria for civil commitment under the SVPA. Fifteen percent, or substantially less than one-fifth, of Dr. Gottfried’s entire direct testimony hardly constitutes a “significant portion of her testimony.”

Dr. Gottfried’s only other testimony regarding the PPG occurred during cross-examination. Respondent’s counsel questioned her briefly about Respondent’s PPG, focusing on Respondent’s failure to show any arousal to the Marshall stimulus set, that Respondent’s results were “exactly what [Dr. Gottfried] expected,” and that “**it’s what we all know, he - - he has a pedophilic disorder**, and there was “**nothing out of the ordinary**” in the results. (Appendix pp. 274-277) (emphasis added). Thus, even considering Dr. Gottfried’s cross-examination testimony, her PPG testimony was not a “significant portion of her testimony.” Further, the PPG evidence was

arguably cumulative to the undisputed evidence that Respondent is a pedophile with current and on-going sexual arousal to prepubescent children, an issue Respondent conceded (discussed above).

The State briefly referenced the PPG during closing argument as only one data point in Respondent's comprehensive psychosexual evaluation, focusing instead on the thoroughness of Dr. Gottfried's evaluation, Respondent's offenses, Respondent's statements to Dr. Gottfried, the issues the two experts agreed on, and the basis for the DMH evaluator's opinion that Respondent did not need to be confined for treatment. (Appendix pp. 364-376). More significantly, Respondent's counsel argued in closing that **the PPG merely showed Respondent had a pedophilic disorder, which he admitted.** (Appendix pp. 380-381). Thus, contrary to the court's characterization of Dr. Gottfried's testimony as "centered on the PPG," the PPG was actually a minimal part of her testimony, the State did not emphasize it in closing, and Respondent admitted the results were expected.

A "person's dangerous propensities are the focus of the SVP Act." In re Care & Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008) (*quoting In re Care and Treatment of Corley*, 353 S.C. 202, 577 S.E.2d 451, 453 [2003]). In SVPA actions, the State is required to prove beyond a reasonable doubt that the person presently suffers from a mental abnormality or personality disorder that makes him likely to engage in future acts of sexual violence if not confined for treatment. *See In re Care and Treatment of Taft*, 413 S.C. 16, 774 S.E.2d 462, 466 (2015) (the State must prove beyond a reasonable doubt that the person is presently a sexually violent predator). Considering the State's significant burden of proof, any reliable test or assessment tool used by an expert in assessing the person's mental status and risk to reoffend, including the PPG, should be submitted for the jury's consideration in accessing the expert's

methodology and ultimate opinions. An expert is always subject to cross-examination about any test or assessment on which the expert relied in forming relevant opinions.

In this case, both experts diagnosed Appellant with pedophilic disorder (a deviant sexual interest in prepubescent children), with current and on-going sexual arousal to prepubescent children. In light of that undisputed diagnosis, the jury had to determine if Appellant had the propensity to offend sexually against children in the future if not confined for treatment. Dr. Gottfried considered the PPG results as a single data point in a multi-faceted, comprehensive psychosexual evaluation, and without focusing on the PPG, she testified about **all** the tests, assessments, and information she considered in reaching her opinions regarding Appellant's pedophilic disorder diagnosis and his risk to reoffend sexually if not confined for long term control, care and treatment.

In the face of Respondent's contention he was longer sexually interested in children, the PPG results indicated Respondent's well-established history of sexual arousal to prepubescent children continued, which was relevant to the jury's determination of whether Appellant was presently likely to offend sexually against children in the future if not confined for treatment for his pedophilic disorder. Given Respondent's failure to take advantage of treatment offered to him while he was incarcerated, combined with his belief that he was no longer aroused by children, it is doubtful Respondent would realistically seek and or participate in treatment in the community. Thus, in light of all the evidence presented, the prejudice to Respondent did not substantially outweigh the probative value of the PPG evidence.

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. Such an analysis is mandated by the well-established

harmless error case law. Accordingly, in the event this Court finds error in the admission of the PPG evidence, which the State does not concede, this Court should conduct the appropriate harmless error analysis lacking in the court of appeals' flawed harmless error analysis, consider the PPG evidence in the context of the entire case presented to the jury, and reverse the court of appeals' harmless error conclusion.


CONCLUSION

Based on the foregoing, and the matter set forth in the Final Brief of Respondent and Petition for Rehearing, the State respectfully submits the court of appeals erred in its analysis and conclusions regarding the reliability of the PPG in this case. The State asks this Court to correct the court of appeals' error, affirm Judge Kelly's findings and conclusions regarding admissibility of the PPG that were 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,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

By: 
Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR PETITIONER

March 14, 2025