

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Appeal from Anderson County  
The Honorable R. Scott Sprouse, Circuit Court Judge  
On Certiorari to the Court of Appeals  
Court of Appeals Appellate Case No. 2021-000733  
Supreme Court Appellate Case No. 2024-001782

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

RESPONDENT.

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**BRIEF OF PETITIONER STATE OF SOUTH CAROLINA**

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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

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## **QUESTION PRESENTED**

Did the court of appeals err in reversing Judge Sprouse's admission of the PPG evidence because it applied an incorrect standard of review and disregarded Judge Sprouse's careful and meaningful exercise of his discretion, as well as the undisputed evidence before him which established the PPG is a recognized reliable scientific measure of deviant sexual interest in the field of sex offender evaluation and treatment?

## STATEMENT OF THE CASE

Respondent James Lewis Williford was found to be a sexually violent predator at a bench trial in February 2021 and civilly committed to the Sexually Violent Predator Treatment Program for long term control, care and treatment. The court of appeals reversed his commitment, finding Judge Sprouse erred by allowing the State's expert to testify regarding penile plethysmography (PPG) performed by her lab. The State petitioned for a rehearing, which the court of appeals denied. The State petitioned for a writ of certiorari to the court of appeals, which this Court granted by Order filed February 12, 2025.

## STATEMENT OF FACTS

In February 2003, Respondent James L. Williford pled guilty to one count of assault and battery with intent to kill and two counts of criminal sexual conduct, first degree, arising from the sexual assaults of two adult female victims, and sentenced to twenty years incarceration. Prior to Respondent's release from incarceration, Respondent State of South Carolina initiated a civil action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Respondent's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was called for a bench trial on June 14, 2021, before the Honorable R. Scott Sprouse, Circuit Court Judge.

### Pre-Trial

Prior to trial, Respondent moved to exclude all testimony regarding a penile plethysmograph (PPG) administered to him during an evaluation by Emily Gottfried, PhD, of the Medical University of South Carolina (MUSC). Respondent argued there was no standardization related to the PPG, there was no adequate publication or peer-review, there were no quality controls in place to ensure reliability, and there was no measurable margin of error. In response, the State proffered testimony from Dr. Gottfried. (Appendix, pp. 24-33; 256-269).

Dr. Gottfried was qualified as an expert in forensic psychology by stipulation. She testified she is an assistant professor of psychiatry and behavioral sciences at the Medical University of South Carolina (MUSC) and serves as the director of MUSC's Sexual Behaviors Clinic and Lab (SBCL). Her duties include conducting forensic evaluations, overseeing treatment, and teaching and supervising medical students, psychiatry residents, forensic fellows and an assortment of students. (Appendix, pp. 36).

Dr. Gottfried is a clinical member of the Association for the Treatment of Sexual Abusers (ATSA), which is a national organization dealing with the type of work performed at the SBCL, and she sits on the executive committee of the South Carolina ATSA Chapter.<sup>1</sup> She also serves on the executive committee of the American Psychological Association (APA) Division 41, which is the American Psychology and Law Society, as well as the executive committee of the APA Division 12, which deals with clinical psychology assessment. She is a member of the American Academy of Forensic Sciences, and other similar organizations, and is a member of the International Standardization Committee for the PPG. (Appendix, pp. 34-35).

Dr. Gottfried testified she had published twenty-six peer-reviewed articles, written six book chapters, and given peer-reviewed PPG specific presentations and lectures at numerous professional conferences in the United States and Canada. In 2019, she joined with colleagues from the United States, Canada and the United Kingdom to publish a paper in Behavioral Sciences and the Law regarding the use of the PPG in courts across those countries. She stated she has requested approximately forty-two PPGs over the course of her career, with thirty-one specific to sexually violent predator cases. (Appendix, pp. 35-36).

Dr. Gottfried became involved in the instant case after the State requested that the SBCL conduct an independent pre-commitment evaluation of Respondent. Consistent with the best practices in the field, the SBCL evaluation includes reviewing data from multiple sources and multiple methods of testing to look for general psychopathologies, symptoms of mental illnesses, personality disorders, and sexual arousal. They then assess the data gathered in multiple ways. The standard protocol used by the SBCL consists of: 1) a thorough review of all available collateral records; 2) an assessment of general psychopathology, personality functions, substance use, sexual

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<sup>1</sup>ATSA is now the Association for the Treatment and Prevention of Sex Abuse.

functions and sexual history; 3) an assessment of sexual arousal; 4) scoring several risk instruments that look at risk factors from the scientific literature; and 5) conducting an extensive clinical interview with the person. (Appendix, p. 37).

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

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

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

Dr. Gottfried testified the SBCL has multiple quality controls for the PPG testing. Limestone certifies everyone in the SBCL to properly execute their parts of the PPG, including

administration of the PPG and interpretation of the data. They use a new gauge for each test, and the gauge is calibrated on a five-step program before a PPG can even begin. They also use countermeasures to make sure the PPG administration is reliable, and each PPG is conducted in the same way for every examinee. They conduct a sound check, and constantly monitor the temperature and humidity in the PPG room. The person administering the PPG follows standardized instructions in a 10-page document with each examinee. (Appendix, pp. 42-43).

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

The SBCL uses a very conservative cut score (change in penile circumference) to determine whether results are significant or not significant. Studies have shown that anything under ten percent of a full erection (2.5 mm) from baseline is not a valid way to score the PPG, and the SBCL uses a cut score of five millimeters, in part to avoid false positive results.<sup>2</sup> Dr.

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

Gottfried testified using a high cut score may lead to missing some people (false negatives), but in high stakes evaluations such as those pursuant to the SVPA, they do not want to say an examinee is aroused by something when he is not. She also reiterated the PPG is only one data point considered in SBCL evaluations. (Appendix, pp. 44-45).

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

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

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

approval of the Limestone hardware system, which the SBCL uses, and recognition of the PPG as a medical test by the Federal Drug Administration, Medicare and Blue Cross/Blue Shield. (Appendix, pp. 51-53).

Dr. Gottfried acknowledged there are criticisms of the PPG regarding standardization, offenders who do not show expected arousal patterns, and consistency with self-reported arousal patterns. She testified that a study published in 2019 included data from fifty-three PPG studies involving approximately 9500 men and addressed many of the standardization issues, including the type of stimuli used, interpretations using standardized scores, and whether predictive effect sizes were strong or stronger than most risk factors for sexual recidivism. (Appendix, pp. 53-55).

Dr. Gottfried then explained that “sensitivity is true positive,” such as “someone is aroused by children and the PPG shows that they are aroused by children,” which is a “true positive.” “Specificity is a true negative, where the person is not aroused by children and the PPG shows that they are not aroused.” Dr. Gottfried further explained that the SBCL uses the conservative cut score, which may result in more false negatives, rather than risking false positives in a high stakes evaluation. (Appendix, pp. 55-57).

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

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

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

Judge Sprouse found the PPG evidence was admissible under the factors outlined for scientific evidence in case law. Specifically, he found that Dr. Gottfried's testimony established the PPG was subject to peer-review, the subject of numerous publications, and recognized in the DSM-5. (Appendix, pp. 92-94).

Judge Sprouse further found the PPG is used in over fifty labs in various parts of the country. He acknowledged there are different standards between the United States and other countries, but found there is standard application in the United States. (Appendix, pp. 93-94).

As to quality control procedures, Judge Sprouse found the SBCL uses various methods to determine an appropriate baseline for the PPG, and uses a conservative threshold of arousal. He further found that Dr. Gottfried gave a detailed explanation of how the baseline is established and the PPG procedure. (Appendix, p. 94).

Judge Sprouse found the testimony indicated the RCV set is standard and provided by the manufacturer, the SBCL use standard instructions provided by the manufacturer, and there are methods in place to prevent PPG manipulation. He also noted Dr. Gottfried testified the PPG is only one data point considered, and it does not preclude other considerations. (Appendix, pp. 94-95).

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

### **Trial Testimony**

Dr. Gottfried was qualified as an expert in forensic psychology. She testified regarding Respondent's evaluation process, including the tests administered and what she considered in reaching her conclusions. She reviewed Respondent's criminal history, including his qualifying convictions under the SVPA, and stated his scores on actuarial risk assessment tools were in the well above average risk to reoffend category. In addition, Respondent exhibited several dynamic risk factors for reoffending not considered in the actuarial risk assessments. (Appendix, pp. 95-137).

Dr. Gottfried diagnosed Respondent with antisocial personality disorder, narcissistic personality disorder and paraphilic coercive disorder. She testified that the combination of Respondent's personality disorders and paraphilic disorder "significantly increase his risk for future sexual violence." She opined to a reasonable degree of psychological certainty that Respondent has serious difficulty controlling his propensity to commit sexually violent offenses,

and poses a danger to the health and safety of others if not committed for long term control, care and treatment. (Appendix, pp. 137-147).

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

Judge Sprouse found the State had proven beyond a reasonable doubt that Respondent is a sexually violent predator, and ordered that he be committed to DMH for long term control, care and treatment. (Appendix, p. 286). This appeal followed.

By unpublished opinion filed July 24, 2024, a court of appeals, without oral argument, reversed Respondent's commitment, finding Judge Sprouse erred in allowing the PPG testimony because the PPG is unreliable, and the error was not harmless. (Appendix, pp. 330). The State filed a Petition for Rehearing, raising issues regarding the appellate standard of review and the court of appeals' failure to properly analyze the PPG evidence and other evidence presented to Judge Sprouse, and, by Order filed September 20, 2024, the court of appeals denied the State's petition. (Appendix, pp. 349). The State petitioned for a writ of certiorari to the court of appeals, which this Court granted by Order filed February 12, 2025.

## ARGUMENT

**The court of appeals erred in reversing Judge Sprouse's admission of the PPG evidence because it applied an incorrect standard of review, and disregarded Judge Sprouse's careful and meaningful exercise of his discretion, as well as the undisputed evidence before him which established the PPG 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 facts in the record, misapprehended the law related to admissibility of expert opinions and misapplied the appropriate standard of review on appeal. In particular, during a circuit court hearing, consistent with this Court's standards as set forth in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the State presented accepted, scientific evidence to support Judge Sprouse's findings and ruling regarding the penile plethysmograph (PPG) methodology, reliability and admissibility as it related to the expert's opinion on the question of whether Respondent is a sexually violent predator under South Carolina law.

The court of appeals' apparent *de novo* determination regarding the PPG reliability and admissibility failed to recognize and give due deference to the findings and legal conclusions of Judge Sprouse after a full evidentiary hearing. The court of appeals decided the case without oral argument and disregarded the substantial evidence in the record, as well as the multiple scholarly publications and presentations regarding the general reliability and acceptance of the PPG that were cited in the State's Brief.

The State raised these issues in its Petition for Rehearing, which the court of appeals denied. The court of appeals opinion in this case relies in part on the first published opinion in

South Carolina expressly finding the PPG is unreliable and evidence regarding it is inadmissible. *See In re Care and Treatment of Daily*, 443 S.C. 557, 905 S.E.2d 310 (Ct. App. 2024). *Daily* is currently before this Court on certiorari.<sup>3</sup> The court of appeals also reached its conclusions based on an 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.**

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. *Jones*, 541 S.E.2d at 819. This type of evidence is also subject to attack for relevancy and prejudice, and once the evidence is admitted, the factfinder may give it such weight as it deems appropriate. *Council*, 515 S.E.2d at 517-518.

The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing

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<sup>3</sup>The Court also granted a writ of certiorari to review the court of appeals decision in another PPG case, *In re Care and Treatment of Hyman*, Op. No. 2024-UP-271 (S.C. Ct. App. filed July 24, 2024), *cert. granted* February 12, 2025.

the trial court's rulings were based on an error of law or were unsupported by evidence in the record. State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020); State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009); *see also* State v. Davis-Kocsis, 443 S.C. 127, 903 S.E.2d 491 (2024) (appellate court's standard of review regarding evidentiary rulings is "simply to determine whether the trial court acted within its discretion," and "[i]f so, we affirm"). The exercise of discretion means "the trial court—when ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it." State v. Wallace, 440 S.C. 537, 892 S.E.2d 310, 312–13 (2023) (*citing* Morris v. BB&T Corp., 438 S.C. 582, 885 S.E.2d 394, 397 [2023]).

The trial court's recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process; and when a trial court's thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court's exercise of discretion, even when the judges on the appellate court might have made the decision differently. Morris at 397. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it may be offered into evidence, and vigorous cross examination, presentation of contrary evidence and careful instructions on the burden of proof are the traditional appropriate means of attacking admissible evidence. In re Care and Treatment of Matter of Ridley, 433 S.C. 316, 858 S.E.2d 165, 168-169 (Ct. App. 2021).

Respondent contended before the court of appeals that there was no evidence the PPG is reliable and its admission was more prejudicial than probative. The court of appeals agreed,

finding the PPG is unreliable, in part based on Daily. The court of appeals further found that the error in admitting the PPG evidence was not harmless. In reaching its conclusions, the court of appeals, as in Daily, applied a *de novo* standard of review rather than an abuse of discretion standard of review, disregarded significant, undisputed evidence regarding the PPG's reliability and its admissibility as a factor considered by the State's expert in formulating her opinion, as well as the numerous peer-reviewed publications and presentations regarding the PPG that were cited in Petitioner's brief.

Even though the court of appeals cited the appropriate abuse of discretion standard of review, it reversed Judge Sprouse's conclusions with no analysis of the evidence before him, much less his detailed findings on each Jones/Council factor with references to the specific evidence on which he relied. The court of appeals did not find any of Judge Sprouse's findings and conclusions lacked evidentiary support, but in a conclusory fashion, reversed Respondent's commitment while overlooking the extensive evidence before Judge Sprouse regarding the reliability of the PPG, particularly in relation to the Jones/Council factors. The only apparent basis for an error of law was the court of appeals' previous decision in Daily, which the State contends was itself erroneous for many of the same reasons the decision in this case is erroneous.<sup>4</sup>

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<sup>4</sup>Respondent relied heavily on Daily in his brief before the court of appeals and his Return to the Petition for a Writ of Certiorari before this Court. The State contends the court of appeals decision in Daily suffers from the same fundamental errors that are present in this case: 1) failing to apply the appropriate standard of review; 2) disregarding undisputed evidence establishing the PPG is a recognized and reliable scientific measure of deviant sexual arousal; and 3) disregarding other evidence in the record supporting the trial court's findings and conclusions.

## **1. Publications and Peer Review of the Technique**

Dr. Gottfried has extensive, first-hand experience with the PPG, and is certified to administer PPGs, and read and interpret PPG results. She supervises a department at MUSC that includes a PPG lab with the highest possible certifications and highly trained personnel to operate the PPG machine and software. She is involved in national and international organizations regarding behavioral sciences, and sits on a committee working to establish international standards for administering and interpreting PPG results. She testified the PPG has been the subject of numerous peer reviewed articles, book chapters and conference presentations, including an article published approximately one week before the trial in this case. In addition, Dr. Gottfried was personally involved in authoring and/or presenting some of the peer reviewed literature, and she presented at professional conferences about use of the PPG in sex offender evaluations. Dr. Gottfried also testified the PPG is used in the general male sexual health arena for things such as erectile dysfunction, sexual health and wellness. (Appendix, pp. 33-40).<sup>5</sup>

Dr. Gottfried further testified the DSM-5 recognizes the PPG as the most thoroughly researched and longest used objective measure of sexual attraction to children, and ATSA's practice guidelines recognize the PPG as a means to obtain objective behavioral data not readily established with other assessment means. (Appendix, pp. 46-50). In addition, the 2019 book chapter she referenced concluded the PPG is important in both evaluating and treating sex offenders being considered for civil commitment under sexual predator laws because research has

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<sup>5</sup>Before the court of appeals, Respondent dismissed Dr. Gottfried's reference to a June 2021 Nature article as "not relevant to [the PPG's] use in this case." The fallacy in Respondent's dismissiveness is it assumes evidence reflecting the PPG's reliability and validity is relevant only if it relates to sexual predator proceedings. Literature discussing the PPG's reliability in medical evaluations and treatment unrelated to sexually violent predator evaluations is clearly relevant and important to the court's consideration of reliability. The fact that the PPG is recognized and used in the general medical field indicates it is reliable as a diagnostic and treatment tool.

found the identification of deviant sexual arousal is a significant predictor of sexual recidivism. (Appendix, p. 52).

## **2. Prior Application of the Method Involved**

Dr. Gottfried testified about the science involved in a PPG, including how the PPG works, what it is intended to measure, and how it is conducted. She candidly acknowledged certain standardization issues remain, particularly internationally, but testified the PPG is now recognized in the DSM-5 as the most thoroughly researched and **longest used** psychophysiological measures of sexual interests, and ATSA includes the PPG in its standard guidelines for sex offender evaluations. In addition, the 2019 book chapter she referenced considered studies involving thousands of cases in which the PPG was used. (Appendix, pp. 42-55). Clearly, the evidence showed the PPG has been used and studied numerous times, and the fact that some clinicians criticize it does not make it any less reliable.

Judge Sprouse specifically found the PPG is used in over fifty labs across the country, and the testimony indicated there were standard procedures used in those labs. (Appendix, pp. 93-94). Dr. Gottfried's undisputed testimony amply supported Judge Sprouse's findings as to this factor.

## **3. Quality Control Procedures**

Dr. Gottfried testified the MUSC PPG lab uses multiple quality control measures. All lab personnel are trained and certified by the machine manufacturer, and are credentialed to perform their part of the PPGs. Each gauge is calibrated multiple times using the same method, and the machine software does not allow a PPG to begin until the gauge is properly calibrated. There are countermeasures to ensure everything is reliable and performed in the same way, including sound checks to make sure all the sound equipment is working properly, and the humidity and temperature inside the lab is controlled. The lab uses standardized instructions from the

manufacturer for every PPG it conducts, and every step in the process from administration to analysis is performed in the same standardized way. In addition, the SBCL uses a conservative cut score to minimize the risk of a false positive result. (Appendix, pp. 42-44).

In the court of appeals Respondent claimed that Dr. Gottfried's testimony regarding quality control was "sparse and mainly revolved around the procedures used at the MUSC lab," but she "was unable to testify regarding how the test is administered in other labs around the country." (Appendix, p. 299). To the contrary, Dr. Gottfried's testimony on this issue was very detailed rather than "sparse," and it is understandable why she gave details regarding the SBCL's PPG administration because she is in charge of the lab and is certified on every step of the process. She testified the Limestone Technologies PPG system used in the SBCL is currently used in between fifty to one hundred labs across the country, and the system is sold with the same standardized instructions on quality control and use. Dr. Gottfried could no more testify regarding the procedures actually used in other unidentified labs than a DNA expert could testify regarding procedures actually used in other unidentified DNA labs.

#### **4. Consistency of the Method with Recognized Scientific Laws and Procedures**

Dr. Gottfried testified about the physiological responses the PPG is designed to measure, how the PPG machine and software measures those responses, and multiple labs across the country and internationally use standard PPG equipment and stimuli. In addition to recognition by the DSM-5 and ATSA, Dr. Gottfried testified the PPG is recognized as a valid medical test by the federal Food and Drug Administration, Medicare and major insurance companies such as Blue Cross/Blue Shield. She stated studies involving the PPG's specificity and sensitivity (false negatives and false positives) have determined the PPG's margin of error, and many such studies

have concluded the PPG is a valuable tool in the assessment and treatment of general male sexual health as well as sex offenders. (Appendix, pp. 44-61, 76-80).

In the face of mere conclusory assertions regarding purported deficiencies in Dr. Gottfried's testimony, Respondent's only specific contention before the court of appeals was that his PPG was unreliable because it included all the RCV stimulus trials, including trials that did not reflect the type of victim Respondent offended against in his sexual offenses, and Dr. Gottfried testified she now tailors the stimulus sets used in a particular PPG to focus on specific victim types based on the offender's offense history. He asserted this somehow exemplified PPG standardization problems and renders the PPG unreliable, an assertion that is a red herring attempting to distract from the entirety of Dr. Gottfried's testimony and create a problem totally unrelated to her testimony.

The on-going standardization issues Dr. Gottfried acknowledged and discussed were primarily international differences particularly regarding the use of child pornography as a stimulus set during the PPG. The fact that a particular PPG may include all of the available stimulus sets rather than only some of the sets has nothing to do with the overall reliability of the PPG as a recognized and accepted test. Tailoring a test to the particular person being tested is hardly novel and does not render the test unreliable. Medical doctors routinely order blood tests for a patient that are tailored to look for certain results and not others, but that does not render the blood tests unreliable.<sup>6</sup>

Notwithstanding dicta in In re Care and Treatment of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), claiming near uniformity of other jurisdictions excluding the PPG, courts,

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<sup>6</sup>Logically, any test focused on certain known factors arguably takes less time and is more reliable than a broad test including factors that may be unrelated to the person being tested, but that does not render the broader test unreliable.

including South Carolina circuit courts, have recognized the general acceptance and admissibility of the PPG in sexually violent predator cases.<sup>7</sup> In In re Detention of Halgren, 156 Wash. 2d, 132 P.3d 714 (2006), the Washington Supreme Court found PPG results were admissible as part of the diagnostic process, and the PPG testimony would assist the jury in understanding the expert's sexual deviancy diagnosis. *Id.* at 719. The court further found the issue of the PPG's reliability goes to the weight of the evidence rather than its admissibility *Id.*; *see also* In re Detention of Herrick, 198 Wash. App. 439, 393 P.3d 879, 885 (2017), *aff'd*, 190 Wash. 2d 236, 412 P.3d 293 (2018)(same).<sup>8</sup>

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

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<sup>7</sup>In addition to Judge Sprouse in the instant case, multiple South Carolina circuit court judges have determined the PPG is reliable and admissible. *See* In re Care and Treatment of Gregg, Op. No. 2022-UP- 336 (S.C. Ct. App. filed August 10, 2022) (reversing Judge D. Jefferson's admission of PPG evidence), *cert. granted* May 23, 2023, *cert. dismissed as improvidently granted* June 5, 2024; In re Care and Treatment of Daily, 443 S.C. 557, 905 S.E.2d 310 (Ct. App. 2024) (reversing Judge Kelly's admission of PPG evidence), *cert granted* February 12, 2025; In re Care and Treatment of Hyman, Op. No. 2024-UP-271 (S.C. Ct. App. filed July 24, 2024) (reversing Judge Henderson's admission of PPG evidence) *cert granted* February 12, 2025; In re Care and Treatment of Sharp, C.A. No. 2022-CP-21-01382 (Price, J.) (appeal pending); In re Care and Treatment of Jeremiah James Pough, C.A. No. 2022-CP-28-00351 (Coble, J.) (appeal pending). Six South Carolina circuit court judges have now listened to the evidence regarding the PPG reliability and concluded the PPG is reliable.

<sup>8</sup>Significantly, Washington's sexual predator statute expressly gives the courts the discretion to order the person to comply with a PPG if requested by the evaluator. 412 P.3d at 295-296; RCW §71.09.050(1). Thus, the Washington legislature recognized the PPG is a valuable tool evaluators should be able to use if necessary.

of PPG mentioned in at least 21 states, including South Carolina), statutes [eleven state statutes] and regulations). *Id.* at 310-313.

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

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 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., Psychophysiologic Assessment of Erectile Response and Its Suppression as a Function of Stimulus Media and Previous Experience with Plethysmography, *Journal of Sex Research*, 37(1), 53–59 (2000); Letourneau, E.J., A Comparison of Objective Measures of Sexual Arousal and Interest: Visual Reaction Time and Penile Plethysmography, *Sex Abuse* 14(3), 207-23 (July 2002); Kalmus, Beech, Forensic Assessment of Sexual Interest: A Review, *Aggression and Violent Behavior*. Vol. 10 Issue 2, pp. 193–217 (2005); Stinson, J.D., Becker, J.V., Assessing Sexual Deviance: A Comparison of Physiological, Historical, and Self-Report Measures. *J. Psychiatric Practice*, 14(6):379-88 (Nov. 2008); Howes, R.J., Measurement of Risk of Sexual Violence Through Phallometric Testing, *Leg Med (Tokyo)* 11 Suppl 1:S368-369 (April 2009); Marshall W. L., Phallometric Assessments of Sexual Interests: An Update, *Current Psychiatry Rep.* 16(1):428 (Jan. 2014); Burke, W. & Murphy L., International Collaboration: The Development of the Real Child Voices Stimulus Set, Keynote Address – International Academy of Sex Research Annual Meeting (July 2017); Plaud, J.J., The Use of Penile Plethysmography in SVP Assessment and Treatment Decision Making, *Sexually Violent Predators: A Clinical Science Handbook* 243-254 (O’Donohue & Bromberg (eds.) (2019); Gottfried, E., Use of Penile Plethysmography in Evaluations with Individuals Who Commit Sex Offenses, South Carolina Chapter of the Association for the Treatment of Sexual Abusers Annual Conference Presentation (March 2019); McPhail, I.V., et al., Validity in Phallometric Testing for Sexual Interests in Children: A Meta-Analytic Review, *Assessment* 26(3) 535-552 (2019); Murphy, L., Bradford, J. M., & Fedoroff, J. P., Laboratory Measurement of Penile Response in the Assessment of Sexual Interest, *Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues*, 159 (2021); Gottfried, E., et. al., Examining Relationships Between PPG Stimuli and a Visual Reaction Test of Sexual

Interest, 40<sup>th</sup> Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers Presentation (September 2021).

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-plethysmography/>] (PPG “is a medical assessment tool that objectively measures a man’s sexual arousal to various stimuli” “by measuring blood flow to the penis, considered the most reliable physiological indicator of sexual interest in males”); About the

Penile Plethysmograph (2025) [<https://arizonaforensics.com/about-the-penile-plethysmograph-new>] (the PPG meets and exceeds the Daubert standard; both Monarch and Limestone systems “have research-based standardized protocols and certification programs that ensure standardization of testing conditions, test instructions, scoring and interpretation methodology as well as report writing.”). While some controversy regarding the PPG remains, as the Sandry court noted, the existence of contrary authority is not dispositive.<sup>9</sup>

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.<sup>10</sup> In addition, the Medicaid/Medicare regulations provide coverage for PPGs.<sup>11</sup> 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.<sup>12</sup> 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.

As Dr. Gottfried testified, further evidence of the PPG’s general acceptance in the mental health community is the reference to it in the DSM-5, which provides:

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<sup>9</sup>Indeed, 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).

<sup>10</sup>See [https://www.accessdata.fda.gov/cdrh\\_docs/pdf5/K052929.pdf](https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf) (501(k) Summary – Limestone Technologies, Inc.); see also About the Penile Plethysmograph, *supra* (The FDA considers the PPG to be a Class II medical device.”).

<sup>11</sup>See Federal Register Volume 72, Number 61, Addendum III and Addendum V (Friday, March 30, 2007) (<https://www.gpo.gov/fdsys/pkg/FR-2007-03-30/html/07-1414.htm>).

<sup>12</sup>The 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>).

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).<sup>13</sup> 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.<sup>14</sup>

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

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<sup>13</sup>Sensitivity 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).

<sup>14</sup>Published 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.

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).<sup>15</sup>

Judge Sprouse heard extensive, undisputed testimony from Dr. Gottfried regarding the reliability of the PPG, including her first-hand experience and certifications with the PPG, research studies and publications concluding the PPG is reliable and a valuable tool in sex offender evaluations and treatment, as well as how Respondent’s PPG results were relevant to Dr. Gottfried’s ultimate opinion. Based on Dr. Gottfried’s testimony, Judge Sprouse found:

a) the PPG was subject to peer-review and publications

Dr Gottfried testified the PPG has been studied and peer-reviewed multiple times, there are over 100 published articles about it, and it has been discussed in the general health literature as well. Some of these studies looked specifically at the margin of error in relation to sensitivity (true positive) and specificity (true negative). (Appendix, pp. 36-40, 75-77);

b) the DSM-5 recognized use of the PPG

Dr. Gottfried testified the DSM-5 recognizes the PPG can be used to compare the person’s normal sexual interests to paraphilic interests. It is also recognized in a 2019 clinical scientific handbook for sexual predator evaluations; it is included in a national organization’s guidelines for assessment, treatment and management of adult male sex offenders; and it is general accepted in the mental and general health communities. (Appendix, pp. 45-54);

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<sup>15</sup>The State cited authoritative published articles in its brief to the court of appeals, but none were referenced in the court of appeals opinion.

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

Dr. Gottfried testified at least fifty labs in the United States, and some international labs, use the Limestone PPG system, and some sexually violent predator treatment programs in the United States use the PPG (Appendix, p. 54);

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

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

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

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

Based on those findings, Judge Sprouse concluded the PPG is reliable and evidence regarding Respondent's PPG results was admissible, but Respondent could challenge the weight and sufficiency of the PPG evidence during the trial. (Appendix, pp. 89-92).

It is clear from the record that Judge Sprouse recognized his role as gatekeeper and his responsibility to exercise his discretion regarding admissibility of PPG evidence, and he meaningfully engaged in exactly the deliberative process described in Wallace and Morris. Rather than fully analyze the evidence and Judge Sprouse's findings, however, the court of appeals

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

Instead of applying the appropriate abuse of discretion standard of review, the court of appeals engaged in a *de novo* review, and based in large part on the Daily opinion as well as the court of appeals' recent, consistent negative view of the PPG in general, it substituted its judgment for Judge Sprouse's without finding abuse of discretion as to any of Judge Sprouse's findings or conclusions. An appellate court's negative view of a particular scientific test or evidence is not a basis for overruling a trial court's comprehensive and well-reasoned analysis and ruling regarding the evidence's admissibility.<sup>16</sup> See Morris, 885 S.E.S.2d at 397 (appellate court defers to the trial court's exercise of discretion even when appellate judges might have decided the issue differently); Wallace, 892 S.E.2d at 312-313 (appellate court will not reverse trial court's ruling on evidentiary issue unless the trial court did not act with the discretion given to trial courts, which generally

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<sup>16</sup>Beginning 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 two PPG cases currently pending before the court of appeals.

means the ruling is not support by the evidence or is controlled by an error of law); Phillips, 844 S.E.2d at 662 (appellate courts analyze the admissibility of scientific evidence for the first time when the trial court fails to meaningfully exercise its discretion).

The court of appeals failed to apply the required abuse of discretion standard of review, disregarded substantial evidence in the record, and substituted its judgment for Judge Sprouse's well-reasoned ruling. Accordingly, the Court should reverse the court of appeals opinion, affirm Judge Sprouse's appropriate, careful and meaningful exercise of his discretion, and reinstate Respondent's civil commitment.

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

Even assuming error, the court of appeals' harmless error analysis was fundamentally flawed. In determining the purported error in admitting the PPG evidence was not harmless, the court of appeals again focused on very limited testimony regarding the PPG without considering that testimony in context and in relation to the entirety of the evidence as required by well-established South Carolina case law.<sup>17</sup>

Error is harmless where it could not reasonably have affected the result of the trial. In re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893, 897 (2003). "A harmless error analysis is contextual and specific to the circumstances of the case," and "the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Heller, 399 S.C. 157, 731 S.E.2d 312, 320 (Ct. App. 2012) (emphasis added). "It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611, 613 (1983).

"It is well-established that it is a near insurmountable burden for a defendant to prove prejudice in the context of a bench trial as a judge is presumed to disregard prejudicial or inadmissible evidence." State v. Inman, 395 S.C. 539, 720 S.E.2d 31, 45 (2011) (*citing People v. Jackson*, 949 N.E.2d 215, 229 [2011][the danger of prejudice is lessened in a bench trial]). While the PPG evidence in this case was prejudicial to Respondent, that prejudice did not invalidate Judge Sprouse's ultimate verdict.

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<sup>17</sup>The 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.

As with its PPG analysis, the court of appeals set forth the correct harmless error standard, then failed to apply it to this bench trial. Rather than considering the PPG testimony in context and reviewing the case before Judge Sprouse as a whole, the court of appeals simply concluded the PPG evidence “may” have contributed to Judge Sprouse’s verdict, and therefore, error in admitting the PPG evidence was not harmless.

In finding admission of the PPG evidence was not harmless, the court of appeals disregarded other, and indeed overwhelming, evidence in the record that more than supported Judge Sprouse’s verdict, even without any of the PPG evidence. Dr. Gottfried testified about Respondent’s evaluation process, including the full battery of psychological tests administered, and what she considered in reaching her conclusions. She reviewed Respondent’s criminal history, including his qualifying convictions under the SVPA, and stated his scores on actuarial risk assessment tools were in the well above average risk to reoffend category. In addition, Respondent exhibited several dynamic risk factors for reoffending not considered in the actuarial risk assessments. (Appendix, pp. 95-137).

Dr. Gottfried’s testimony regarding Respondent’s PPG results was limited, and she stated the results were consistent with the pattern of Respondent’s reported sex offenses. (Appendix, pp. 125-126). Her entire trial testimony, including cross-examination and re-direct, is seventy-six pages (Appendix, pp. 96-172), and the PPG testimony is one and one-half pages, or 2% of her entire testimony. Contrary to the court of appeals’ finding that Dr. Gottfried testified extensively about the PPG results, this demonstrates Dr. Gottfried did not “emphasize” the importance of Respondent’s PPG results, and as she stated, the PPG was only one data point she considered in the course of her comprehensive evaluation of Respondent.

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

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

Judge Sprouse heard from two experts. Dr. Gottfried performed a thorough and multi-faceted psychosexual evaluation. The DMH evaluator performed a less thorough evaluation, accepted as true Respondent's self-serving statements to her about how he had changed, then blamed Respondent's significant history of sexual offending on his childhood rather than a mental abnormality or personality disorder. She agreed Respondent was at high risk to reoffend sexually according to well-established actuarial risk assessment tools, one of which she scored one point higher than Dr. Gottfried's score. On cross-examination, she also agreed, albeit reluctantly, that there was "some evidence initially that could suggest" Respondent had an interest in non-consensual sexual activity. (Appendix, pp. 173-230). Thus, the only true disagreement between the experts was whether Respondent has a mental abnormality or personality disorder at all.

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

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

The court of appeals' reference to a quote from Dr. Gottfried's pre-trial testimony stating she could not do an evaluation if she could not use the PPG blurs the substance of her entire statement. The court of appeals correctly stated the reason Dr. Gottfried gave for not doing an evaluation without the PPG was that it was part of the standard protocol for the SBCL, she would not take it out of that protocol, and she would still administer it and use it as a data point if she could not testify about the results in court. (Appendix, p. 65). Contrary to the court of appeals'

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

The evidence about Respondent's PPG results was a minimal part of Dr. Gottfried's testimony. Rather than consider that minimal testimony in context with the other evidence presented as the basis for Dr. Gottfried's opinions, and give credence to Judge Sprouse's ability to sort through all the evidence presented, the court of appeals summarily concluded the error in admitting the PPG evidence was not harmless beyond a reasonable doubt.

In concluding the purported error in admitting the PPG evidence was not harmless, nothing in the court of appeals' opinion indicates the court of appeals properly considered or analyzed any of the other undisputed evidence before Judge Sprouse. Accordingly, even if admission of the PPG evidence was error, which the State does not concede, this Court should reverse the court of appeals' flawed harmless error analysis, affirm Judge Sprouse's finding that Respondent met the criteria for civil commitment as a sexually violent predator, and reinstate Respondent's civil commitment.

## CONCLUSION

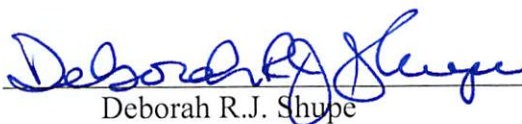
Based on the foregoing, and the matter set forth in the Final Brief of Respondent and Petition for Rehearing, the State respectfully submits this Court should reverse the court of appeals opinion, affirm Judge Sprouse's findings and conclusions regarding admissibility of the PPG testimony that were amply supported by the evidence, and reinstate Judge Sprouse's well-supported verdict finding Respondent is a sexually violent predator and committing him for long term control, care, and treatment pursuant to the SVPA.

Respectfully submitted,

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

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