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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Florence County
Honorable Roger E. Henderson, Circuit Court Judge

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

RESPONDENT.

APPELLATE CASE NO. 2024-001781

BRIEF OF RESPONDENT

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ISSUE PRESENTED

In this sexually violent predator (SVP) case, did the Court of Appeals correctly hold the trial judge abused his discretion by admitting evidence through the state's expert witness about the penile plethysmograph (PPG) Respondent underwent as part of his precommitment evaluation since the evidence was unreliable in violation of Rule 702, SCRE, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE?

STATEMENT OF THE CASE

On April 16, 2020, the Attorney General filed a petition seeking to involuntarily commit Respondent pursuant to the Sexually Violent Predator Act (SVPA). App. 319-388. The trial commenced on June 7, 2021, before the Honorable Roger E. Henderson. Assistant Attorney General Suzanne Shaw represented the state. James Falk represented Respondent. App. 1.

On June 9, 2021, the jury found Respondent was a sexually violent predator pursuant to the SVPA. App. 291, l. 25 – 292, l. 11. Judge Henderson ordered Respondent be committed to the Department of Mental Health for long term control, care, and treatment. App. 393.

Respondent filed a timely notice of appeal. On July 24, 2024, the Court of Appeals reversed Respondent's involuntary commitment in an unpublished opinion. Matter of Hyman, 2024-UP-271 (S.C. Ct. App. filed July 24, 2024); App. 452-454. On August 12, 2024, the state filed a petition for rehearing with the Court of Appeals. App. 455-470. Respondent filed a return to the petition for rehearing on August 22, 2024. App. 471-482. By order filed September 20, 2024, the Court of Appeals denied the petition for rehearing. App. 483.

By order filed February 12, 2025, this Court granted the state's petition for writ of certiorari. The state filed its brief of petitioner on March 14, 2025. This brief of respondent follows.

STATEMENT OF FACTS

Respondent was convicted in 1997 of second degree criminal sexual conduct with a minor and lewd act. He was sentenced to an indeterminate period of time not to exceed six years pursuant to the Youthful Offender Act for second degree criminal sexual conduct with a minor and fifteen years suspended upon the service of five years' probation for lewd act. Subsequently, in 2016, Respondent was convicted of third degree criminal sexual conduct with a minor. He was sentenced to ten years imprisonment. App. 110, l. 17 – 112, l. 9.

On April 16, 2020, before Respondent's anticipated release from the Department of Corrections, the Attorney General filed a petition seeking to involuntarily commit Respondent pursuant to the Sexually Violent Predator Act (SVPA). App. 322-391. Dr. Marie Gehle, the chief psychologist with the Department of Mental Health, was court appointed to evaluate Respondent. Dr. Gehle opined that Respondent did not meet the criteria to be committed as a sexually violent predator. While she found Respondent had been convicted of sexually violent offenses and suffered from a mental abnormality, specifically pedophilic disorder, Dr. Gehle opined Respondent was not likely to engage in acts of sexual violence, as defined under the SVPA, if not confined. App. 193, l. 21 – 194, l. 2. She determined Respondent's risk of reoffending "is the same as the average sex offender." App. 208, l. 16 – 209, l. 17.

The state sought a second opinion from the Sexual Behaviors Clinic and Lab of the Medical University of South Carolina (MUSC). Dr. Emily Gottfried, the director of the lab, evaluated Respondent in February 2021 and opined Respondent met the criteria to be committed as a sexually violent predator. Like Dr. Gehle, Dr. Gottfried found Respondent had been convicted of sexually violent offenses and suffered from a mental abnormality, also pedophilic disorder. App. 110, l. 17 – 112, l. 9; App. 124, ll. 11-19. However, it was her opinion that

because of Respondent's disorder, he is likely to reoffend and "poses a danger to public safety." App. 146, l. 23 – 147, l. 13.

Respondent moved pretrial to prohibit Dr. Gottfried, the state's sole witness, from testifying about the PPG performed on Respondent as part of her precommitment evaluation pursuant to Rule 702, SCRE, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), and Rule 403, SCRE. Respondent filed a written motion on May 28, 2021, which contained his argument as to why the PPG evidence should be excluded. App. 298-302.

Respondent argued the PPG is controversial and there is no evidence of its reliability. He cited to the Court of Appeals' opinion in Matter of Bilton, 432 S.C. 157, 162, 851 S.E.2d 442, 444 (Ct. App. 2020), in which the Court of Appeals recognized that courts have uniformly declared that PPG test results are inadmissible as evidence because there are no accepted standards for the test in the scientific community. Respondent further argued there is no evidence that PPG testing conducted using the "Marshall and the Real Child Voices (RSV) audio and visual scenarios is reliable." He concluded, "Absent peer-reviewed studies attesting to the reliability and standardization of both these stimulus scenarios, the [trial judge] is left with no assurances that the results of [Respondent's] PPG test are reliable." App. 300.

In support of his argument, Respondent cited to a 2015 article coauthored by Dr. William Burke, PhD, who played a substantial role in the development of the Real Child Voices stimulus set, and Dr. Gregg Dwyer, MD, EdD, who was formally associated with the Sexual Behaviors Clinic and Lab at the Medical University of South Carolina (MUSC). In the article, the authors wrote: "Wide variation exists concerning stimuli types, assessment protocol, and means of analyzing and interpreting phallometric results in forensic laboratories in North America.

Concerns regarding the lack of standardization in phallometry across sites have been discussed since its creation, however, little improvement has been made. There are challenges in the implementation of standardization within jurisdictions and between countries." App. 301-302 (citing Standardization of Penile Plethysmograph Testing in Assessment of Problematic Sexual Interests, Journal of Sexual Medicine 2015; 12:1853-1854).

In addition to being unreliable, Respondent argued the evidence concerning the PPG was "highly prejudicial." He asserted, "This is the situation where the jury is gonna grab onto these results from the PPG test, I believe possibly to the exclusion of any other information and not listen to anything else and they'll [commit] him [Respondent] based on the PPG test [alone]." App. 9, l. 6 – 10, l. 13. Respondent further maintained the probative value of the evidence was outweighed by the danger of unfair prejudice. App. 11, ll. 1-7.

In support of his motion, Respondent proffered the testimony of Dr. Gehle. Dr. Gehle is a clinical psychologist with the Department of Mental Health. She conducts precommitment evaluations pursuant to the SVPA. Throughout her career, she has conducted over two hundred evaluations. Dr. Gehle explained that she does not use the PPG as part of her precommitment evaluations nor does any other psychologist at the Department of Mental Health because the PPG is not standardized, meaning it is "given differently by different people" which "makes the results unreliable." She testified that in psychology, experts typically use standardized testing. The "hallmark of standardized testing is the IQ test." App. 13, l. 15 – 14, l. 22. Dr. Gehle asserted:

> It has an instruction book. It has a scoring manual. . . . Everybody is trained to give it the exact same way. Everybody is trained to score it the exact same way. There is not a lot of interpretation there. That way I know if I give . . . an IQ test I can compare it to somebody else who gave the same IQ test and I'll know that they gave it the same way and I'll know that the results are comparable. When you take away that standardization you don't know how, how this person

> gave the test. And in terms of the PPG . . . everybody uses different stimulus sets. The stimulus sets are the things that they're showing the person to [elicit] sexual arousal. Those vary from site to site. People use different stimulus sets. And there is no research on the stimulus set that is used at MUSC, the real child voices, to show that it's [a] valid, reliable assessment. So we don't know if when they say that they're measuring pedophilic arousal if they're actually measuring pedophilic arousal. We don't know if they, when they say they're measuring exhibitionistic arousal if they're actually measuring that because it's not been proven in research. [There is no] public research on that stimulus set. So it's similar to if I decided to give an IQ test, but I'm gonna make up my [own] words, I'm gonna make up my own, I don't know, portions of the test to give to somebody but then I'm gonna say it's an IQ test because it looks similar to other IQ tests. It's just not the way it works in psychology.

App. 14, l. 22 – 16, l. 8.

Dr. Gehle further explained that one of the "primary types of reliability is test/retest. So if I give the test on one day, can I come back later and get a similar result with the same test." She asserted that the "test/retest reliability" of the PPG is "very poor." App. 17, ll. 8-17.

Moreover, Dr. Gehle testified that one of the stimulus sets used by MUSC to measure arousal, called "real child voices," was developed by Dr. William Burke. It includes "auditory scenarios followed by some pictures." The auditory scenario and pictures relate to the category of arousal the psychologist is attempting to measure. For example, if the psychologist is attempting to measure pedophilic arousal, the auditory scenario may be an interaction between an adult male and a real child actor, followed by a picture of a fully clothed female child. App. 18, l. 3 – 19, l. 12. Dr. Gehle asserted that to her knowledge, there have been no peer reviewed studies on the real child voices stimulus set. App. 20, ll. 14-16. Peer reviewed studies are important because such studies would show whether the set is reliable and valid. Dr. Gehle explained that "reliability is how a test is used . . . over time so can you give the same test and get similar results" while "validity is whether you are measuring what you say you're measuring, what you think you're measuring." App. 20, l. 18 – 21, l. 3.

One of the few books that have been written about conducting sexually violent predator evaluations is Evaluations of Sexually Violent Predators, Best Practices by Phillip Whitt and Mary Alice Conroy. The book contains recommendations from experts in the field about how to conduct such evaluations. App. 21, l. 19 – 22, l. 23. Dr. Gehle explained that the authors recommend against the use of PPG testing in SVP precommitment evaluations because the reliability and validity of such testing cannot be established given that the test is not standardized. App. 24, ll. 4-16.

Lastly, Dr. Gehle testified that the PPG is often used during treatment for sex offenders. Its purpose in therapy is to "start a conversation with the offender about their arousal." App. 23, l. 5 – 24, l. 1. Whereas, during an evaluation, the purpose of the PPG is to diagnose an offender or measure risk assessment. App. 22, l. 24 – 23, l. 4. Gehle asserted that "the stakes are very different" in a therapy setting as opposed to a precommitment evaluation. App. 23, ll. 8-17.

In response to Respondent's motion, the state proffered the testimony of Dr. Emily Gottfried, the director of the Sexual Behaviors Clinic and Lab at MUSC. Dr. Gottfried manages the contract MUSC has with the Attorney General's Office to conduct precommitment evaluations pursuant to the SVPA. App. 34, l. 25 – 35, l. 13. At the time of her testimony, she had completed seventeen precommitment evaluations and was in the process of conducting an additional five. App. 38, ll. 13-17. Dr. Gottfried orders a PPG be conducted on all adult men who are referred to the lab for evaluation. App. 37, ll. 5-6.

Dr. Gottfried maintained that the Sexual Behaviors Clinic and Lab is "certified by Limestone Technologies as a clinical and research laboratory" and she is a "Limestone Technology Certified Clinical Analyst." Dr. Gottfried later clarified that Limestone Technologies is merely a company that developed the hardware and software used by some

psychologists to conduct PPGs. App. 39, ll. 10-24. The Sexual Behaviors Clinic and Lab is not certified by "any independent agency" nor are any of the analysts, including Dr. Gottfried. App. 62, ll. 6-21.

Dr. Gottfried has written twenty-six peer reviewed articles. One of those articles concerns the PPG. The article compares the differences and similarities between the use of the PPG in Canada, the United States, and the United Kingdom. App. 36, ll. 12-17. She is also "working on a couple of studies" concerning the validity and reliability of the real child voices stimulus set, which Dr. Gottfried used during the PPG conducted on Respondent. However, none of those studies have been peer reviewed. App. 59, ll. 12-16. Dr. Gottfried maintained that her current study, again which has not been peer reviewed, "found that the results of the Marshall [stimulus set] and RCV [real child voices stimulus set] were really consistent with one another. We also found that the RCV were more likely to be valid. So ***if*** *somebody is going to have a valid test* it was *more likely* to be the RCV than the Marshall." App. 59, l. 22 – 60, l. 8 (emphasis added).

Dr. Gottfried admitted there is no way to verify "false/positives" with the PPG, which is why she only uses the PPG results "as one data point" in reaching her final conclusion. She also uses "a very conservative cut off score." She explained, "So the cut score is how you can tell if a test is clinically significant arousal or not. So it is a valid test? So is there millimeter of change from the baseline where they started, flaccid penis. You want it to be over a particular cut score millimeters of change before you say, like, okay that is arousal." Gottfried testified that the "literature" recommends doing at least ten percent of a full erection which would be 2.5 mm." Her lab uses 5 mm. Her "colleagues in Canada use 1 mm." However, Gottfried emphasized that

Canada does not have a sexually violent predator act so psychologists there use the PPG only for treatment. App. 65, l. 22 – 67, l. 13.

After the proffer, Respondent's counsel argued that while there may be studies about the use of the PPG, there have been no peer reviewed articles about the reliability and validity of the real child voices stimulus set which was used as part of the PPG conducted on Respondent. He also asserted that being certified by the manufacturer is different than being certified by an independent agency. Specifically, he stated, "I mean, the guy who invented the equipment . . . said yeah you're using [it] the way I want it used." Counsel concluded that any testimony concerning the use of the PPG and its results should be excluded because the evidence is not reliable or valid, particularly when used in a high stakes evaluation like in this case. App. 67, l. 21 – 68, l. 14.

The trial judge found the evidence was admissible. He asserted, "Mr. Falk [Respondent's counsel], I certainly understand your concern about the results of the test, but in this particular case I'm going to find that the relevance outweighs, the probative value outweighs the prejudice so I'm going to allow the PPG test results to come in by way of your witness, Ms. Shaw [the assistant attorney general]." App. 72, ll. 14-19.

Before Dr. Gottfried testified about the PPG in front of the jury, Respondent renewed his objection. The judge again overruled the objection. App. 137, ll. 1-17. In her testimony before the jury, Dr. Gottfried explained that the PPG "is an objective physiological measure of male sexual arousal." App. 137, l. 24 – 138, l. 1. She maintained the test is "useful . . . because in these types of evaluations people have understandable motivation for not being very forthcoming about what they are currently sexually aroused by." She further contended that the PPG is "important . . . because the research suggests that having sexual interest in children *as measured*

by this test is a strong predictor or risk factor for future sexual offending." App. 138, ll. 2-9 (emphasis added).

Dr. Gottfried testified that as part of the PPG, Respondent was "administered two separate sets that had a number of trials." When both sets were viewed together, Respondent "showed clinically significant arousal to scenarios featuring sexual violence against a prepubescent female child, coercion against a prepubescent female child, sexual violence against a pubescent or adolescent child in puberty, three scenarios featuring consensual sexual activity with an adult woman, two scenarios featuring coercion against a prepubescent female child, coercion against an adult man, coercion against an adult woman, two scenarios featuring persuasion against a prepubescent female child, and sexual activity with a male infant." She maintained Respondent's "maximum arousal" during "the first set of trials" "was to a scenario featuring sexual violence against a prepubescent female child" and during the "second set of trials" "was to a scenario featuring coercion against a female prepubescent child." Dr. Gottfried asserted these findings were consistent with Respondent's "actual offending history" given Respondent "offended against prepubescent female children." App. 141, l. 1 – 142, l. 5.

The assistant attorney general relied heavily on the PPG evidence during her closing argument to the jury. She went so far as to argue that Respondent's results from the PPG test were sufficient alone to find he should be committed for long term care, control, and treatment. App. 266, ll. 14-23. Specifically, she asserted:

> In 1996, he [Respondent] molested three little girls. He was alleged to have and he was charged and he was convicted and he served his time. He started looking at child pornography immediately after he got out, despite having sex offender treatment in the community.
>
> Until he could no longer control himself, in 2015 he molested three more little girls or was alleged to have happened. He was convicted of those offenses and sentenced to ten years. And now he's asking you to let him go back into the

> community after he has had no further sex offender treatment and after he [recidivated]. I would submit to you that based on that information alone without **the PPG evidence, which clearly indicates that he has current sexual interest in children**, that information with or without the PPG, indicates that he is likely to reoffend.
>
> But **let's go into the PPG. What was he sexually excited by in those scenarios? He was sexually excited by coercive scenarios against prepubescent children. He was sexually excited by coercive scenarios against adults, both men and women. But he was also sexually excited about a scenario featuring an infant and a male. He got erections to all of those things.** That was in February of this year. And ***I would submit to you that that, in and of itself, is enough to put him in a secured facility for long term care, control, and treatment.*** I would submit that **[he] has, in fact, got an active interest in small children and if he's released to the community he is very, very, [likely] to reoffend. There's not a question of if this individual, it's the question of when.** And I would submit that evidence in front of you, we have proven beyond a reasonable doubt that Mr. Hyman is, in fact, a sexually violent predator. We're asking you to commit him to Wellpath Facility for a long term treatment and we thank you.

App. 265, l. 24 – 267, l. 7 (emphasis added).

The jury ultimately found Respondent was a sexually violent predator under the SVPA. App. 294, l. 25 – 295, l. 11.

On appeal, Respondent argued the trial judge abused his discretion by admitting evidence through the state's expert witness about the PPG Respondent underwent as part of his precommitment evaluation since the evidence was unreliable in violation of Rule 702, SCRE, State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010), and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE.

The Court of Appeals reversed Respondent's involuntary commitment. App. 452. The court correctly held "the PPG is not reliable as required by Rule 702" and "thus, the trial court abused its discretion in admitting the PPG results." App. 453. In support of this holding, the Court of Appeals cited to its recent published opinion in Matter of Daily, Op. No. 6061 (S.C. Ct.

App. filed June 12, 2024 (Howard Adv. Sh. No. 22 at 19); Matter of Daily, 443 S.C. 557, 905 S.E.2d 310 (Ct. App. 2024). In Daily, the Court of Appeals likewise held the trial court abused its discretion by admitting evidence about the PPG Daily underwent because "the PPG is not reliable, as required by Rule 702." App. 453.

In reversing Respondent's commitment, the Court of Appeals also cited to its opinion in Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020). In Bilton, the court recognized that the PPG is "controversial and has been criticized for a lack of standardization and for being subject to manipulation." Id. at 162, 851 S.E.2d at 444. The court further emphasized that "with limited exceptions . . . courts have 'uniformly' declared that PPG test results are 'inadmissible as evidence because there are no accepted standards for this test in the scientific community.'" Id. at 162-63, 851 S.E.2d at 444 (quoting Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000)). App. 453.

The Court of Appeals also correctly held the error in admitting Respondent's PPG test results was prejudicial. App. 453. The Court asserted that "Dr. Gottfried's testimony regarding the result of the PPG had the appearance of scientific evidence; she described the PPG test as 'an objective physiological measure of male sexual arousal' and 'the gold standard of looking at adult males sexual arousal,' and she explained that the test was 'a strong predictor or risk factor for future sexual offending.'" App. 454. Additionally, the Court of Appeals emphasized that the state relied on the results of the PPG when it cross-examined Respondent and during its closing argument when it argued the results were enough to put Respondent in a secured facility. App. 454. Consequently, the court concluded the error in admitting the PPG evidence was not harmless. App. 454.

STANDARD OF REVIEW

"The standard of review for evidentiary rulings is very deferential." Matter of Bilton, 432 S.C. 157, 161, 851 S.E.2d 442, 444 (Ct. App. 2020), reh'g denied (Dec. 22, 2020). "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." Id. at 161-162, 851 S.E.2d at 444 (quoting State v. Commander, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417 (2011)) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 162, 851 S.E.2d at 444 (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted).

ARGUMENT

In this sexually violent predator (SVP) case, the Court of Appeals correctly held the trial judge abused his discretion by admitting evidence through the state's expert witness about the penile plethysmograph (PPG) Respondent underwent as part of his precommitment evaluation since the evidence was unreliable in violation of Rule 702, SCRE, *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE.

The Court of Appeals correctly held the trial judge abused his discretion by permitting Dr. Gottfried, who was qualified as an expert in clinical and forensic psychology, to testify about Respondent's results from the PPG he underwent as part of his precommitment evaluation since the evidence was unreliable in violation of Rule 702, SCRE, State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Moreover, any probative value of the evidence was substantially outweighed by the danger of unfair prejudice and should have been excluded pursuant to Rule 403, SCRE. Respondent presented extensive evidence during the pretrial hearing through Dr. Gehle's testimony and the cross-examination of Dr. Gottfried establishing that the PPG is unreliable.

"The admission of expert testimony is governed by Rule 702, SCRE, which provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." Id. at 445, 699 S.E.2d at 175. "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-446, 699 S.E.2d at 175 (citing Rule 703, SCRE).

"Expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, *the trial court must evaluate the substance of the testimony and determine whether it is reliable*." Id. (emphasis added) (internal citation marks omitted).

To determine reliability, the trial judge should apply the factors outlined by this Court in State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), 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. Council, 335

S.C. 1, 20, 515 S.E.2d 508, 518 (1999). "Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Id. (citing Rule 403, SCRE).

Recently, in Matter of Daily, 443 S.C. 557, 565-66, 905 S.E.2d 310, 314-15 (2024), the Court of Appeals held the trial court erred by admitting PPG evidence through Dr. Gottfried, the same state witness who testified in this case, because the PPG is not reliable. The court further held the error in admitting the PPG evidence was not harmless because the court could not say beyond a reasonable doubt that "the PPG test results did not contribute to the jury's verdict." Id. at 567, 905 S.E.2d at 315. The court reasoned that Dr. Gottfried, like in this case, was the state's sole witness and "a significant portion of her testimony centered on the PPG test." Id.

Previously, in Matter of Bilton, 432 S.C. 157, 162, 851 S.E.2d 442, 444 (Ct. App. 2020), the Court of Appeals addressed a narrow issue regarding the admissibility of PPG test results through an expert who did not administer or observe the PPG testing nor review the test's raw data. Id. The Court of Appeals held that "due process does not allow a testifying expert to be a pipeline for someone else's scientific work to be admitted into evidence without a baseline demonstration of reliability." Id. at 167, 851 S.E.2d at 446. It concluded the trial judge abused his discretion by admitting the PPG evidence and, finding the error was not harmless, remanded for a new commitment trial. Id. at 167, 851 S.E.2d at 447.

In so holding, the Court of Appeals emphasized that the PPG "test is controversial and has been criticized for a lack of standardization and for being subject to manipulation." Id. at 162, 851 S.E.2d at 444 (citing United States v. Rhodes, 552 F.3d 624, 626-627 (7th Cir. 2009) and United States v. Weber, 451 F.3d 552, 565 (9th Cir. 2006)). It noted that "with limited exceptions . . . courts have 'uniformly' declared that PPG test results are 'inadmissible as

evidence because there are no accepted standards for this test in the scientific community.'" Id. at 162-163, 851 S.E.2d at 444 (quoting Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000)). The court further emphasized that "some authorities take the position that the PPG has value in treating sex offenders but that concerns about reliability and a lack of uniform standards preclude its admission as evidence at trial." Id. at 164, 851 S.E.2d at 445 (citing Commonwealth v. Ortiz, 93 Mass.App.Ct. 381, 100 N.E.3d 790, 796-97 (2018) (collecting cases)). Other "jurisdictions have held that an expert may rely on a PPG as a basis for the expert's opinion but have expressly declined to consider whether the test results should be disclosed to the jury given the special weight the jury is likely to afford things that have the appearance of scientific evidence." Id. at 164-65, 851 S.E.2d at 445 (citing In re Commitment of Sandry, 367 Ill.App.3d 949, 306 Ill.Dec. 202, 857 N.E.2d 295, 317 (2006)).

In Billups v. Commonwealth, 652 S.E.2d 99, 101-02 (Va. 2007), the Virginia Supreme Court held an expert's report that relied on PPG testing was inadmissible, even at a sentencing hearing. The court in Billups approached PPG testing with a critical eye and ultimately concluded it was inadmissible:

> Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers not schooled in the particular field under consideration. Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be "scientific," and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism. That tendency has given rise to frequent complaints of "junk science" in the courts. To guard against that risk, we continue to require a "threshold finding of fact with respect to reliability of the scientific method offered. . . ."

Id. at 101-02. "Esoteric" and "junk science" are both accurate descriptions of PPG testing. See also United States v. Medina, 779 F.3d 55, 65 (1st Cir. 2015) (discussing reliability problems with PPG testing); Gentry v. State, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) ("Given the

rejection of [PPG] evidence by other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia."); United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995) (holding the PPG did not meet the scientific standards for admissibility and emphasizing the "extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test.").

Dr. Gehle's *in camera* testimony aligns with what other jurisdictions and courts have concluded. She maintained that the PPG is not standardized, meaning it is "given differently by different people" which "makes the results unreliable." App. 13, l. 25 – 14, l. 12. Dr. Gehle further testified that to her knowledge, there have been no peer reviewed studies on the real child voices stimulus set. App. 20, ll. 14-16. She emphasized that peer reviewed studies are important because such studies would show whether the set is reliable and valid. App. 20, l. 18 – 21, l. 3. Moreover, Dr. Gottfried even admitted there were no peer reviewed studies showing the real child voices stimulus set, which she used during the PPG test conducted on Respondent, is valid and reliable. She is merely "working on a couple of studies" in an attempt to show the validity and reliability of the RCV stimulus set. App. 59, ll. 12-16. Additionally, Dr. Gottfried admitted there is no way to verify "false/positives" with the PPG. App. 65, l. 22 – 66, l. 12. Consequently, under the framework outlined by this Court in Jones, the state failed to establish that the PPG was reliable.

Because the PPG and Respondent's results from the test are not reliable, Dr. Gottfried's corresponding testimony had no probative value. Assuming the evidence had probative value, it was substantially outweighed by the danger of unfair prejudice to Respondent.

The Court of Appeals correctly determined the erroneous admission of the PPG evidence was not harmless. App. 543-454. Because the PPG test and its results had the appearance of

scientific evidence, it is likely the jury afforded the evidence "special weight." See Bilton, 432 S.C. at 164-65, 851 S.E.2d at 445. The error was highly prejudicial because of the risk noted by the Virginia Supreme Court in Billups that laymen, especially jurors, would gravitate toward uncritical acceptance of the PPG when confronted with such a foreign and unusual trial like an SVP case. Dr. Gottfried urged the jury in this direction, telling them that the PPG "is an *objective* physiological measure of male sexual arousal." App. 137, l. 24 – 138, l. 1 (emphasis added). Moreover, the state relied heavily on the results during its closing argument going so far as to argue that the results alone were "**enough to put him in a secured facility for long term care, control, and treatment**." App. 266, ll. 21-23 (emphasis added).

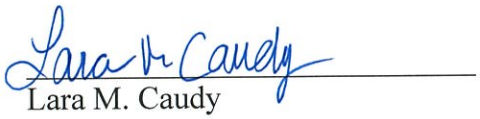
There is simply no way to conclude that the erroneous admission of the PPG test results did not contribute to the jury's verdict. Accordingly, the Court of Appeals correctly held the trial judge abused his discretion by permitting Dr. Gottfried to testify about the PPG and Respondent's results and that the error was not harmless. See State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("The key factor for determining whether a trial error constitutes reversible error is 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'").

Respectfully, this Court should dismiss the state's petition for writ of certiorari as improvidently granted. In the alternative, this Court should affirm the decision of the Court of Appeals holding the PPG is not reliable and the error in admitting Respondent's PPG results was not harmless.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests this Court dismiss the state's petition for writ of certiorari as improvidently granted. In the alternative, Respondent respectfully requests this Court affirm the decision of the Court of Appeals.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

This 28th day of April, 2025.