

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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May 13 2025

S.C. SUPREME COURT

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

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

RESPONDENT.

**REPLY BRIEF OF PETITIONER
STATE OF SOUTH CAROLINA**

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ARGUMENT

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

In his "Statement of the Case," Respondent relies heavily on trial counsel's argument in support of the motion to exclude the PPG evidence. He also relies on the DMH evaluator's testimony in support of Respondent's motion, but fails to acknowledge the evaluator's total lack of training on how the PPG works, and how to administer a PPG or interpret PPG results. She had no firsthand experience administering or even observing PPG tests, and she had a very limited understanding of how a PPG works. All her purported knowledge about the PPG was gleaned from some unidentified articles and an outdated 2009 publication.¹ Significantly, none of the "articles" the DMH evaluator purportedly read were identified and submitted to Judge Henderson for consideration, and Respondent cites none in his Brief to this Court.

In contrast to the DMH evaluator's total lack of PPG experience and knowledge, Dr. Gottfried has extensive training on how the PPG works, how to administer a PPG and interpret the results, and she has firsthand experience actually administering PPGs and interpreting the results. Dr. Gottfried has twenty-six peer-reviewed published articles, including an article comparing the PPG's use in Canada, the United Kingdom and the United States, she has written book chapters

¹The most remarkable thing about the DMH evaluator's PPG testimony was her lack of knowledge about it.

about best practices in sexual behavior evaluations that include information about the PPG, and she has given peer-reviewed research presentations regarding the PPG at national and international conferences. (Appendix, pp. 34-37). She testified that research literature indicates sexual arousal to non-consensual abusive scenarios is a strong predictor of sexual recidivism, the PPG provides a physiological measure of male sexual arousal, and the PPG has been peer-reviewed in both the sex offender and general sexual behavior literature. (Appendix, pp. 39-41).

Dr. Gottfried further testified the recommendation not to use the PPG in the 2009 book the DMH evaluator referenced was premised on a 2006 article from Bill Marshall, the developer of the Marshall stimulus set, and he subsequently published another article in 2014 “that was much more supportive of the PPG.”² She stated research since 2009, including a published 2019 meta-analysis of data from multiple studies with PPG test results from 1000s of men, has addressed many issues identified in earlier PPG research.³ In addition, the Diagnostic and Statistical Manual, 5th Ed., (DSM-5) recognizes the PPG is the “most thoroughly researched and longest used” psychophysiological measure of sexual interests. (Appendix, pp. 49-50).

Respondent’s contention that the Real Child Voices (RCV) stimulus set had not been peer-reviewed is simply inaccurate. Dr. Gottfried testified she is participating with international partners in studies comparing the RCV, Marshall and other stimulus sets, and abstracts of those studies have been peer-reviewed by scientific committees and accepted for presentation at national and international research conferences, including the American Academy of Forensic Sciences, the International Association for Sex Research, the American Psychology and Law Society, and

²The DMH evaluator was not aware of the 2014 article. She did admit that the 2009 “best practices” book she relies on so heavily has not been updated since 2009. (Appendix, p. 25).

³Even though she claimed that she kept up with the literature regarding the PPG, apparently she was not aware of the 2019 meta-analysis article.

the Association for the Treatment of Sexual Abusers. (Appendix, pp. 59-61). While it is true no articles about that research have been published to date, there are many forms of peer-review, including peer-reviewed conference presentations, and the lack of publication is not dispositive. *See In re Viagra*, 424 F.Supp.3d 781, 791 (N.D. Cal. 2020) (expert testimony may be reliable and admissible without peer-review and publication); *United States v. Cloud*, 576 F.Supp.3d 827, 841 (E.D. Wash. 2021) (existence of peer-reviewed literature can help determine methodology's reliability, but publication or the lack thereof is not dispositive).

Respondent also erroneously contends the State “relied heavily on the PPG evidence during her closing argument.” The State’s initial closing argument constitutes 59 lines across four pages of the transcript, and the total discussion of Respondent’s PPG results is at most 14% of the entire argument. (Appendix, pp. 264-267). . Importantly, prior to discussing Respondent’s PPG results, the State laid out Respondent’s sex offending history from 1996 and 2015, and the admissions Respondent made to Dr. Gottfried during his clinical interview, all of which the State argued indicated a current sexual interest in children “**without** the PPG evidence,” and “**with or without the PPG** indicates that he is likely to reoffend.” Then, in responding to Respondent’s closing argument, the State only mentioned that the PPG took place on the second day Respondent went to the SBCL, and again focused on all the information Dr. Gottfried obtained and considered, including Appellant's sexual offending history, the multiple array of tests administered at the SBCL, and Appellant's own statements during his interview with Dr. Gottfried. (Appendix, pp. 277-281). Thus, the last thing the jury heard about was all the information other than the PPG that Dr. Gottfried gathered and considered in formulating her opinion.

Respondent also cites Dr. Gottfried’s testimony about false positive PPG results, but misrepresents the context of her testimony. Dr. Gottfried did state there is no “real” way to check

for false positive results, which is why her lab uses the PPG as only one data point and utilizes a conservative cut score to minimize the possibility of a false positive result; however, that was not the end of her testimony.⁴ She further testified she looks for consistency between the person's offending history and self-report, and across "multiple trials" in the PPG, to reach a conclusion regarding the person's diagnosis and risk. (Appendix, pp. 65-66). No scientific test is safe from false results, but recognizing the high stakes of SVPA evaluations, the SBCL does as much as possible to minimize false positive results.

Respondent relies heavily on the court of appeals' reference to Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), citing dicta from the Bilton opinion that was based on the same outdated articles and case law Respondent cites in support of his argument.⁵ Respondent then summarily claims that "esoteric" and "junk science" accurately describe the PPG. This assertion ignores, as did the court of appeals, the extensive amount of scientific research, studies and peer-reviewed scholarly articles in scientific journals and presentations at national and international scientific conferences, all of which clearly establish the PPG is neither esoteric (intended for or understood by only a small group) or "junk science" (assertions that have the appearance, but not the actuality, of scientific support).⁶

⁴There is no "real" way to detect false positives on many recognized medical tests, which does not render the tests inherently unreliable.

⁵Notably, relying on a 2006 Ninth Circuit Court of Appeals opinion, the Bilton court erroneously found that Dr. Gottfried's lab "compels the subject to arouse himself sexually and then forces him to view deviant stimulants." *Id.* at 444. Dr. Gottfried categorically put that assertion to rest in this case. (Appendix, p. 31).

⁶Indeed, Respondent's trial counsel candidly conceded "we can accept that there has been studies about the use of the PPG test," and stated Respondent's main focus at trial was the RCV stimulus set. (Appendix, p. 67). As discussed above, studies of the RCV stimulus set have been peer-reviewed through abstracts submitted to national and international professional conferences, and accepted for presentation at those conferences.

The evidence presented to Judge Henderson established that the PPG is now widely accepted as a valid, objective measure of male sexual arousal with application and use in the general health and mental health communities. The mere fact some may consider the PPG “controversial” does not render the PPG either esoteric or junk science.⁷ Literally every scientific test was labeled as esoteric or junk science at one point, including DNA testing, but after research and study, many were gradually accepted as valid in that particular field.⁸ Such is the case with the PPG.

As Dr. Gottfried testified and set forth in the Brief of Petitioner, there is ample evidence the PPG is now widely researched and generally accepted. Brief of Petitioner, pp. 24-29. In addition to the numerous peer-reviewed articles and presentations regarding the PPG, and notwithstanding the Bilton dicta claiming near uniformity of other jurisdictions excluding PPG evidence, courts have specifically recognized the general acceptance and admissibility of PPG evidence in sexually violent predator cases. Brief of Petitioner, pp. 20-22. Rather than analyze the evidence presented or even cite any recent articles or cases with contrary conclusions, however, Respondent simply makes the conclusory assertion, as the court of appeals did, that the PPG is unreliable and inadmissible.

Again citing Bilton, the court of appeals found, and Respondent asserts, that the PPG evidence “had the appearance of scientific evidence.” Notably, the Bilton court specifically held

⁷ Indeed, a prominent mental health expert in South Carolina testified that the Static-99R risk assessment is unreliable, but the Static-99R is accepted and used by virtually every other mental health expert in the field of sex offender risk evaluations. See Matter of Chapman, Appellate Case No. 2014-001181, Record on Appeal, pp. 64-67, 238-245, 252). Using Respondent’s conclusory logic, the Static-99R would be considered “esoteric” and “junk science.”

⁸The on-going controversy regarding the reliability of COVID testing results amply demonstrates the fact that scientific tests can be controversial. Some professionals would, and do, label those tests “junk science,” but the test results are considered reliable by many healthcare professionals.

that the State's expert testimony regarding the PPG was a pipeline for scientific work performed by someone else, which expressly recognized that the PPG is a **scientific** assessment.⁹ Thus, the court of appeals' finding, and Respondent's argument, that Dr. Gottfried's testimony merely "had the appearance of scientific work" is contrary to the Bilton court's recognition that PPG evidence is **in fact** scientific evidence. Further, the fact that the PPG is a recognized scientific test is amply supported by simply looking at the peer-reviewed scientific publications and scientific conference presentations regarding the PPG cited above and in the Brief of Petitioner, as well as the approval of the PPG by the FDA, Medicaid/Medicare, and insurance companies.¹⁰

Respondent also relies on In the Matter of the Care and Treatment of Daily, 443 S.D. 557, 905 S.E.2d 310 (Ct. App. 2024), as support for his argument that the PPG is unreliable. Daily is now before this Court on certiorari. Two other cases the court of appeals reversed on the PPG issue are also before this Court. In the Matter of the Care and Treatment of Williford, Appellate Case No. 2024-001782; In the Matter of the Care and Treatment of Pough, Appellate Case No. 2025-000548.

As to the harmless error issue, Respondent essentially ignores the substance of the harmless error argument set forth in the Brief of Petitioner, instead relying on cherry-picked snippets of Dr. Gottfried's testimony regarding the PPG and the State's closing argument as support for his conclusory assertion the PPG is unreliable, and summarily concluding the PPG evidence "had no probative value." As Dr. Gottfried repeatedly testified, the PPG results was only one data point in

⁹ Indeed, Respondent quotes the very part of the Bilton opinion that contains the reference to the PPG as "scientific work."

¹⁰ Those publications include the Journal of Sex Research, the Journal of Psychiatric Practice, Current Psychiatry Reports, the Journal of Forensic Research, and the Sexually Violent Predators: A Clinical Science Handbook (2019). The conferences include the Association for the Treatment of Sexual Abusers (ATSA), the South Carolina Chapter of ATSA, and the International Academy of Sex Research.

her multi-method evaluation, and as discussed in the Brief of Petitioner, it did not constitute a significant part of her testimony before the jury. (Brief of Petitioner, pp. 32-35). Given the issues in SVPA proceedings, the probative value of the PPG test results simply cannot be seriously disputed.

Further, Respondent chose to completely ignore the other, and overwhelming, evidence presented to the jury, which is set forth in the Brief of Petitioner, that provides ample support for the jury's verdict, even without the PPG evidence. (Brief of Petitioner, pp. 33-34). Both experts found Respondent has a mental abnormality that is causally connected to his sexual offending, and they only disagreed on whether Respondent was a risk to reoffend against children in the future. Dr. Gottfried's opinion regarding Respondent's risk to reoffend was based on a comprehensive, multi-faceted psychosexual evaluation, including Respondent's own admissions. The DMH evaluator's opinion on that issue, however, was essentially based on Respondent's statements during their interview, and significantly, the testimony revealed Respondent lied to her about some critical aspects of his history.

Even without the PPG evidence, there was more than sufficient, indeed overwhelming, evidence to support the jury's determination that Respondent has a mental abnormality (undisputed), his sexual offending was caused by his mental abnormality (undisputed), he has a sexual preference for prepubescent children (undisputed), and the DMH evaluator's assessment of Respondent's risk to reoffend was extremely lacking. In addition, the jury also heard Respondent's own testimony and was able to judge his credibility, which was a primary factor in the DMH

evaluator's risk analysis. In light of that evidence, any error in admitting the PPG evidence was harmless beyond any reasonable doubt.¹¹

Respondent contends there is "simply no way" to conclude that admission of the PPG evidence did not contribute to the jury's verdict. This argument can be applied to virtually any harmless error analysis regarding admission of evidence. What Respondent ignores is the requirement that the harmless error analysis consider the entire case, not just cherry-picked testimony and evidence. State v. Heller, 399 S.C. 157, 731 S.E.2d 312, 320 (Ct. App. 2012). When the PPG evidence is considered in the context of the entire case, there was ample evidence other than the PPG from which the jury could reasonably conclude beyond a reasonable doubt that Respondent is a sexual predator as defined by the SVPA.¹²

Propensity is a central focus of SVPA cases. In re Corley, 353 S.C. 202, 577 S.E.2d 451, 454 (Ct. App. 2003) ("a person's dangerous propensities are the focus of the SVP Act"). The State bears the burden to prove beyond a reasonable doubt that the person's dangerous propensities make him likely to reoffend sexually in the future. The PPG has been repeatedly recognized as an important tool for an expert conducting a thorough psychosexual evaluation to use in determining the person's future risk to reoffend.¹³ If the expert uses the PPG results in forming an opinion on that issue, the results can provide important information for a factfinder charged with determining whether the person is a risk to reoffend sexually in the future beyond a reasonable doubt.

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

¹²In addition, since the PPG results were consistent with Respondent's extensive offending history, the PPG evidence was arguably cumulative to the evidence of Respondent's history.

¹³No one disputes that the PPG is useful and reliable for treatment of sex offenders. If the PPG is reliable for treatment purposes, it is reliable for assessment purposes as well.

This case, as well as others currently pending before the Court, demonstrate the reliability of the PPG.¹⁴ Respondent has a long history of sexual offenses against prepubescent children that persisted even after he was sanctioned by the judicial system and had sex offender treatment while incarcerated and in the community. On the PPG, Respondent showed significant arousal across two different stimulus sets to multiple trials involving sexual molestation of prepubescent children. In short, the PPG accurately measured Respondent's continuing sexual arousal to prepubescent children, which greatly increases his risk to reoffend against prepubescent children in the future.

The evidence establishes the court of appeals erred in holding that the PPG is unreliable and PPG evidence is inadmissible, and then its harmless error analysis was fundamentally flawed. Accordingly, the court of appeals opinion should be reversed and Respondent's commitment pursuant to the SVPA should be affirmed.

¹⁴At this time, there is one other case currently pending before the court of appeals in which the PPG is an issue. In the Matter of the Care and Treatment of Sharp, Appellate Case No. 2024-000553.

CONCLUSION

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

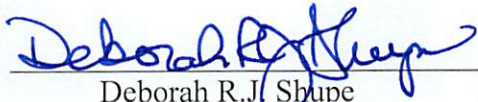
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