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S.C. SUPREME COURT

In the Supreme Court of South Carolina

APPEAL FROM FLORENCE COUNTY

Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2021-000734
Supreme Court Case No. 2024-001781

In the Matter of the Care and Treatment of Andy Eugene Hyman,

Respondent.

BRIEF OF AMICUS CURIAE ACLU OF SOUTH CAROLINA

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Statement of Interest of Amicus Curiae

The American Civil Liberties Union of South Carolina Foundation (ACLU-SC) is a nonpartisan and nonprofit organization that advocates for civil rights and civil liberties in South Carolina. As part of that mission, ACLU-SC is committed to protecting the due process rights of all people in South Carolina. ACLU-SC has substantial experience litigating civil rights issues. Amicus respectfully believes that this brief will aid the Court in its consideration of the issues in this case.

Question Presented

Did the Court of Appeals err in reversing Judge Henderson's admission of the PPG evidence because it applied an incorrect standard of review and ignored the substantial evidence before Judge Henderson that established the PPG is a recognized reliable scientific measure of deviant sexual interest in the field of sex offender evaluation and treatment, and its harmless error analysis was fundamentally flawed?

Introduction

The penile plethysmograph (PPG) is a highly invasive and humiliating evaluation of sexual arousal. First developed in the early 20th century (at a time when lobotomies and arsenic were routinely prescribed), the test involves strapping a gauge to a person's penis, forcing them to listen to simulated child pornography, and then measuring the size of any resulting erection. Arousal itself is not, of course, a crime at all. At most, the test uses penile engorgement as a proxy for psychological arousal, then purports to draw from that an inference about an individual's likelihood to *unlawfully act* on those impulses. Because the PPG lacks scientific rigor and has been repeatedly shown to produce unreliable results, it is widely disfavored in courts of law.

Here, Amicus addresses three cases that involve the state-compelled administration of PPG testing and the later admission of PPG results in Sexually Violent Predator (SVP) proceedings. In each case, the State's first expert concluded that the Respondents did *not* need to be civilly committed. Only then did the State seek a second opinion from Dr. Emily Gottfried, who used PPG testing to conclude that each Respondent *should* be civilly committed. In each case, the trial court allowed the State to introduce the PPG evidence over counsel's objection, and the finder of fact used that evidence to find that civil commitment was indeed necessary. In each appeal, the appellate court concluded that the admission of PPG evidence was an abuse of discretion and reversed.

As Respondents' briefs aptly explain, the decisions of the Court of Appeals should be affirmed. Amicus curiae, the ACLU of South Carolina, writes separately to urge the Court, in view of the ever-present dangers of PPG evidence, to adopt a general presumption against the admissibility of PPG evidence in SVP proceedings. As with polygraph evidence, a general rule against admissibility will streamline the inquiry for trial courts, will produce consistent results for criminal defendants, and is supported by the overwhelming record showing that PPG testing is unreliable and constitutionally questionable.

Statement of the Cases

There are three cases before the Court regarding the admissibility of PPG evidence. The Respondents, Shawn Daily, Andy Hyman, and James Williford, each pleaded guilty to sex crimes.[1] As the Respondents neared the end of their sentences, the State initiated proceedings to civilly commit Respondents under the South Carolina Sexually Violent Predator Act. S.C. Code Ann. § 44-48-10, *et seq*.

[1] Daily pleaded guilty to three counts of lewd acts on a minor. Hyman pleaded guilty to one count of criminal sexual conduct with a minor. Williford pleaded guilty to two counts of criminal sexual conduct.

As part of those proceedings, the trial courts ordered the Department of Mental Health (DMH) to assess whether the Respondents were SVPs. DMH psychologists thoroughly evaluated each Respondent and determined that none were SVPs. Unwilling to accept DMH's determination, the State hired Dr. Emily Gottfried to independently evaluate each Respondent. Unlike the DMH psychologists, Dr. Gottfried forced each Respondent to submit to a PPG test.[2] Dr. Gottfried concluded that each Respondent was an SVP, in part based on their PPG results.

Dr. Gottfried testified at each Respondent's trial. In each case, she described the PPG as an "objective physiological measure of male sexual arousal" and a "strong predictor or risk factor for future sexual offending." *See In re Hyman*, Respondent's Brief at 9–10. She then described how each Respondent demonstrated arousal in response to problematic sexual stimuli.

In each case, the trier of fact[3]—convinced by Dr. Gottfried's testimony—determined the Respondent to be an SVP. The courts civilly committed each Respondent. There is no end-date for their commitment, which will last until a court finds that they are no longer a danger to society. S.C. Code Ann. § 44-48-10(B).

Argument

I. The Court should adopt a general rule against the admission of PPG evidence, just as it has for polygraph evidence.

PPG evidence is almost uniformly inadmissible throughout the country. *Matter of Bilton*, 432 S.C. 157, 851 S.E.2d 442, 444 (Ct. App. 2020); *see* Major Christopher Mathews, *et al.*, *Debunking Penile Plethysmograph Evidence*, 28 No. 2

[2] *See* S.C. Code § 44-48-90(C) ("The court shall order the person to comply with any reasonable testing and assessments deemed necessary by the qualified evaluator.").

[3] Juries determined that Daily and Hyman were SVPs. The bench determined that Williford was an SVP.

THE REPORTER 11, 13 (2001) (describing how PPG evidence has been rejected across state, federal, and military courts); *see also id.* at 13 n.19 (collecting cases). That nationwide uniformity is unsurprising, given that the problems with PPG evidence are innate—not case-specific. The dangers posed by those inherent flaws are further sharpened by the unique, consequential, and delicately prejudicial context of an SVP trial. Given those considerations, Amicus urges the Court to adopt a general rule against the admission of PPG evidence in SVP proceedings. As explained below, such a rule is supported by the record, will promote the consistent administration of justice throughout the state, and will spare precious judicial resources.

A. A bright-line rule is warranted because the dangers of admitting PPG evidence are not case-specific.

1. PPG testing lacks scientific rigor and produces unreliable results.

For a host of reasons, the "accuracy and reliability of penile plethysmograph testing have been severely questioned." *United States v. Weber,* 451 F.3d 552, 564 (9th Cir. 2006); *see also United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995) ("[S]cientific literature does not regard the [PPG] test as a valid diagnostic tool."); Mathews, *supra* at 14 ("The firm conclusion of the experts is that the validity, reliability, and the quantification of penile plethysmograph results have an unacceptably high rate of inaccuracy.").

To start, PPG testing lacks standardization. *Weber*, 451 F.3d at 565. Even Dr. Gottfried, the State's expert in the cases *sub judice*, conceded that standardization is an "on-going issue." According to Dr. Gottfried, international legal differences create an obstacle to standardization because stimuli can be legal in one country and illegal in another. But regardless of the reason, courts have found it impossible to evaluate scientific tests that lack standardization. *E.g.*, *United States v. Cordoba*,

194 F.3d 1053, 1058–62 (9th Cir. 1999) (agreeing with the district court that "without such [controlling industry] standards a court can not [sic] adequately evaluate the reliability of a particular polygraph exam"). The PPG is no exception. Without industry standards, test administrators have "unfettered discretion to define certain arousal as deviant," and so cannot evaluate the reliability of a particular PPG exam. *United States v. Cheever*, No. 15-CR-00031-JLK, 2016 WL 3919792, at *14 (D. Colo. July 18, 2016), *aff'd,* 671 F. App'x 718 (10th Cir. 2016).

PPG results are also subject to manipulation by the test subject. For example, subjects can suppress their arousal during the test. *Weber*, 451 F.3d at 564. What is more, some subjects have been able to "display arousal to stimuli they *do not* find erotic." *Cheever*, 2016 WL 3919792, at *14 (emphasis in original). In effect, it is possible to mimic ordinary sexual preferences, even if one's preferences are not ordinary.

Finally, the PPG is unreliable because its use depends on two shaky assumptions about human sexuality and recidivism. The PPG measures the minute enlargement of a subject's penis and then assumes that the engorgement is a valid proxy for the subject's sexual arousal. But "[e]xamples of low subjective-genital agreement abound in both clinical and academic sexology. Some men report feeling sexual arousal without concomitant genital changes and experimental manipulations can increase penile erection without affecting subjective reports of sexual arousal." Meredith L. Chivers, *et al.*, *Agreement of Self-Reported and Genital Measures of Sexual Arousal in Men and Women: A Meta-Analysis*, ARCH SEX BEHAV. 39, 5–6 (2010) (available at: https://doi.org/10.1007/s10508-009-9556-9) (citing studies). Indeed, arousal non-concordance—that is, disagreement between a person's physical and psychological experience of arousal—is an established phenomenon. *Id.* at 1.

Then, after assuming that penile engorgement necessarily equates to sexual arousal, the PPG's proponents make another inferential leap—they assume that a subject's sexual arousal can predict subjects' likelihood to commit future criminal acts. But as other courts have noted, "[t]here is no scientifically accepted data presented to justify this assumption, nor does it have any logical basis." *Cheever*, 2016 WL 3919792, at *15. To start, this inference disregards a person's executive functioning. As researchers have noted, "many 'normal' men bear deviant sexual desires for children, and *are able to restrain these desires*." *Cheever*, 2016 WL 3919792, at *14 (citing studies). Problems run the other way, too. For example, studies show that many individuals who commit sexual offenses against children are *not* sexually aroused by material involving children. Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & CIV. RTS. L. REV. 1 (2004) ("a significant number of known sex offenders display no pattern of arousal on the plethysmograph.").

In short, the PPG's proven lack of reliability and standardization make it fundamentally improper—in all instances—for use in a court of law.

2. PPG testing is highly invasive and raises serious substantive due process concerns.

The right to bodily integrity is a fundamental liberty interest protected by the Due Process Clause.[4] *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 172 (1952)

[4] "The Due Process Clause . . . provides both procedural and substantive due process protections." *State v. McSwain*, 445 S.C. 276, 283, 914 S.E.2d 124, 127 (2025). The substantive component "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). In addition to the fundamental rights articulated in the Bill of Rights, substantive due process also offers special protection for, *inter alia*, the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and the right to

(holding that pumping the stomach of a criminal defendant against his will violated substantive due process). Thus, the State may only invade that interest when it is necessary to satisfy a compelling governmental interest. *Id.*; *see also State v. Law*, 270 S.C. 664, 674, 244 S.E.2d 302, 307 (1978) (forced medication implicates "right to bodily integrity" but satisfies strict scrutiny where doing so is necessary to render criminal defendant competent to stand trial); *but see Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (involuntary blood draw did not infringe on fundamental right because the procedure "has become routine in our everyday life" and "would not be considered offensive by even the most delicate").

There can be no real dispute that PPG testing implicates an individual's fundamental right to bodily integrity. As the First Circuit put it in *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992), "[o]ne does not have to cultivate particularly delicate sensibilities to believe degrading the process of having a strain gauge strapped to an individual's genitals while sexually explicit pictures are displayed in an effort to determine his sexual arousal patterns." *See also, e.g.*, *Bailey v. Pataki*, 708 F.2d 391, 402 (2d Cir. 2013) ("We think there can be no serious doubt that the liberty interests implicated here are of a high order."); *Weber*, 451 F.3d at 570–71 ("The [PPG] procedure violates a prisoner's bodily integrity . . . mental integrity . . . [and] moral integrity."); *United States v. Malenya*, 736 F.3d 554, 566 (D.C. Cir. 2013) (Kavanaugh, J., dissenting in part and concurring in part) ("[The PPG] implicates significant liberty interests and would require, at a minimum, a more substantial justification than other typical conditions of supervised release."). PPG testing is far more physically and psychologically invasive than forcibly medicating

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marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (collecting cases).

an incompetent criminal defendant, *see Law*, 270 S.C. at 674, 244 S.E.2d at 307, and, unlike a blood draw, "is hardly routine," *see Harrington*, 977 F.2d at 44.

It is unlikely that PPG testing would ever satisfy strict scrutiny in an SVP proceeding. Even assuming the State has a compelling interest in evaluating an individual's likelihood to reoffend, use of the PPG is far from "necessary" to satisfy that interest because it produces unreliable conclusions, *supra,* Part I.A.1, and because far less invasive alternatives are available to the government, *see, e.g.*, *Weber*, 451 F.3d at 567 ("There are alternatives available in the treatment of sexual offenders that are considerably less intrusive than plethysmograph testing and may be sufficiently accurate."); *see also* Lindsay Blumberg, *The Hard Truth About the Penile Plethysmograph: Gender Disparity and the Untenable Standard in the Fourth Circuit*, 24 WM. & MARY J. WOMEN & L. 593, 611 (2018) (discussing alternatives to the PPG, including options that are "not only less invasive than the [PPG], but . . . also cheaper and require less time.").

3. PPG testing raises serious First Amendment concerns by targeting thoughts, not conduct.

Admission of PPG evidence also raises grave First Amendment implications. The First Amendment protects "freedom of thought," *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965), and shields individuals "against the prosecution of thought crime," *United States v. Balsys,* 524 U.S. 666, 713–14 (1998) (Breyer, J., dissenting). Necessarily, then, an individual's "fantasies . . . are his own and beyond the reach of government[.]" *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 67–68 (1973). "The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts,'" *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (quoting *Stanley v. Georgia,* 394 U.S. 557, 566 (1969)), or "punish[] an individual for pure thought," *Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 765 (7th Cir. 2004) (en banc) (upholding a permanent ban of a sex offender from all city

parks because it was based on "thought plus conduct"—i.e., his visit to a park to "cruise"—not "mere thought") ("The City has not banned him from having sexual fantasies about children.").

Similarly, courts have held that "unacted-upon prurient sexual thoughts"—as measured by PPG—"'however obnoxious to most people, may not be taken into consideration by a sentencing judge,'" *United States v. McLaurin*, 731 F.3d 258, 263–64 (2d Cir. 2013) (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993)). In essence,

> [t]he established traditions of our law embrace the ancient common law principle that liberty should not be impinged or threatened for what a person thinks, but only for what a person does. . . . Penile plethysmograph tests rely on the heavy assumption that stimuli arousal is strongly related to the potential for recidivism. Inferences by the courts about a person's potential for sexual offense based on his innermost sexual desires fail to acknowledge that arousal data is not an ineluctable precursor to deviant behavior. This observation, *a fortiori*, illustrates the dangerous conflation of thought with behavior.

Cheever, 2016 WL 3919792, at *16 (rejecting the "special condition requiring [defendant] to submit to plethysmograph testing" and noting its "intrusive[ness] to freedom of thought").

Those serious and inescapable constitutional concerns—which are not case-specific, but rather innate to the use of PPG evidence—further tip in favor of a bright-line presumption against admission of PPG evidence.

B. A bright-line rule is warranted because the dangers of PPG evidence are particularly acute in SVP proceedings.

1. *SVP trials threaten "a significant deprivation of liberty" and thus demand heightened due process protections.*

The procedural protections required by the Due Process Clause "depend upon the importance of the interest involved and the circumstances under which the deprivation may occur." *South Carolina Dep't of Social Servs. v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 733–34 (2002) (citing *South Carolina Dep't of Social Servs. v. Beeks,* 325 S.C. 243, 481 S.E.2d 703 (1997); *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976)). Importantly, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.' " *In re Chapman*, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017) (quoting *Addington v. Texas*, 441 U.S. 418 (1979)).

Given the stakes in an SVP trial, courts should apply maximally protective procedural rules. An SVP finding can result in a life-long deprivation of liberty. S.C. Code § 44-48-120. Short of capital punishment, that is the most severe deprivation available to the State. *Harmelin v. Michigan*, 501 U.S. 957, 960 (1991). Even where civil commitment is not for life, it remains a "significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425. Indeed, the "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Whether the State restrains an SVP to punish or to treat, it remains an extraordinary deprivation.

South Carolina acknowledged the seriousness of this deprivation by adopting the reasonable doubt standard for SVP proceedings. S.C. Code § 44-48-100. Implicitly recognizing that an SVP proceeding can result in a de facto life sentence, the Legislature went beyond the constitutional minimum. *Addington*, 441 U.S. at 433 (holding "clear and convincing" standard enough for civil commitment). In

fashioning evidentiary rules, the Court should follow the General Assembly's lead. Stringent admissibility rules—particularly concerning the admission of expert testimony—ensure that indeterminate deprivations of liberty are not achieved by fundamentally unreliable methods like the PPG.

2. *The inherent dynamics of an SVP trial demand a cautious approach to admissibility under Rule 403.*

The nature of SVP proceedings makes them fraught with the possibility of bias and unfair prejudice. From the outset, the fact-finder knows that the person on trial has been convicted of a sex crime. As the Court has found, the "inherently prejudicial stigma" associated with such crimes is "exceedingly high"—so high that this Court has restricted the admissibility of prior sex crimes even when they are an element of the charged crime. *State v. Cross*, 427 S.C. 465, 478–79, 832 S.E.2d 281, 288 (2019) (holding failure to bifurcate trial violated SCRE 403 where prior sex crime was element of the offense). There is no escaping that juries will be biased against convicted sex offenders.

Bias impacts how juries weigh evidence. Like all humans, jurors are prone to confirmation bias. That is exactly why our courts impose guardrails on the admission of prior crimes and other forms of propensity evidence: "[p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged." *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923).

But in SVP proceedings, there are fewer guardrails. Prior sex-offense convictions will necessarily come before the jury, as will other forms of propensity evidence that would usually be contested under Rule 404, SCRE. This is because SVP proceedings are *about* propensity; at bottom, the criterion for civil commitment is whether the individual is likely to commit another sex crime. S.C. Code § 44-48-100.

As the Court evaluates the PPG's admissibility, Amicus urges the Court to consider the inherent risk of bias and unfair prejudice in these proceedings. As it stands, evidence that would be contested in any other case is admissible by default. To the degree that the Court can minimize compounding prejudice, Amicus asks it to do so.

3. Courts have restricted PPG testing in far less consequential contexts.

"With limited exceptions . . . courts have 'uniformly' declared that PPG test results are 'inadmissible as evidence.'" *Bilton*, 432 S.C. at 162. But instructively, courts have also strongly circumscribed the use of the PPG in other settings. In considering the admission of PPG results in an SVP proceeding, it is useful to consider presumptions against PPG testing (whether *per se* or rebuttable) that courts have fashioned in legal contexts with comparatively lower standards.

Sentencing Hearings

Unlike a criminal trial or SVP proceeding, the rules of evidence are generally inapplicable at a sentencing hearing. Rule 1101(d)(3), SCRE; *Williams v. New York*, 337 U.S. 241, 246 (1949) (A sentencing judge need not follow the rules of evidence when determining the appropriate punishment for a convicted defendant.); *see also* Maneka Sinha, *Junk Science at Sentencing*, 89 GEO. WASH. L. REV. 52 (2021) (calling for greater scrutiny of scientific and technical evidence at sentencing hearings). Despite that, some courts have adopted *per se* rules against the introduction of PPG evidence in sentencing hearings. *See, e.g.*, *Billips v. Com.*, 652 S.E.2d 99, 101–02 (Va. 2007). Others allow a case-by-case approach, with a skeptical eye toward PPG evidence. *See, e.g.*, *State v. Edwards*, 2012 WL 1799025, at *23 (Tenn. Crim. App. May 18, 2012), *overruled on other grounds by State v. Thorpe*, 463 S.W.3d 851 (Tenn. 2015).

Treatment

Although the Parties appear to concede that PPG testing can be properly imposed as part of sex offender treatment, courts are less convinced. Most federal circuits, for example, apply a presumption against the imposition of PPG testing as a special condition of a criminal sentence. That is notable, given that "[t]he level of reliability required for a test to reasonably relate to the goals of supervised release is not as high as the level of reliability required for admissibility into evidence." *United States v. Music*, 49 F. App'x 393, 395 (4th Cir. 2002); *see also Mitchell v. State*, 420 S.W.3d 448, 454 (Tex. App. 2014) ("[A] test's unfitness as evidence says nothing about its fitness for therapy."). Specifically, in federal court, the general rule is that sentencing courts have "wide latitude in imposing conditions of supervised release," *United States v. Reeves,* 591 F.3d 77, 80 (2d Cir. 2010), and that courts may impose special conditions that are "reasonably related" to statutory sentencing factors and that "involve no greater deprivation of liberty than is reasonably necessary for the purposes," 18 U.S.C. § 3583(1)–(2). That general rule of deference falls away, however, when conditions infringe on fundamental liberty rights. *See, e.g.*, *United States v. White*, 782 F.3d 1118, 1138 (10th Cir. 2015) ("[R]estrictions on a defendant's contact with his own children are subject to stricter scrutiny . . . [because] a father has a fundamental liberty interest in maintaining his familial relationship with his children."). Because PPG testing implicates the fundamental right to bodily integrity, *supra,* Part I.A.2, most circuits constrain its inclusion in a sentence. *See, e.g.*, *McLaurin*, 731 F.3d at 261 (prohibiting PPG testing unless "narrowly tailored to serve a compelling government interest"); *United States v. Medina*, 779 F.3d 55, 68 (1st Cir. 2015) (holding that PPG testing is "facially unreasonable" absent a "substantial justification" for its use); *United States v. Cotto*, 782 F. App'x 174, 179 (3d Cir. 2019) ("PPG testing implicates a particularly significant liberty interest and requires a thorough, on-the-record inquiry into

whether it is reasonably necessary in light of the defendant's characteristics and circumstances.").

C. A bright-line rule encourages consistent administration of justice and furthers judicial economy.

The problems inherent in admitting PPG evidence are not case-specific. *See supra*, Part I.A. In other words, the problems with PPG evidence are present in each individual case. To ensure the consistent administration of justice— a result that is valued highly by the South Carolina Constitution, *see* S.C. CONST. Art. I, § 3, and implemented through *stare decisis*, *see Joseph v. S.C. Dep't of Labor, Licensing & Reg.*, 417 S.C. 436, 451, 790 S.E.2d 763, 770 (2016)—similar problems should produce similar answers, regardless of jurisdiction, judge, or parties. As other courts and jurists have noted, bright line rules can be "effective mechanisms for restricting judicial discretion," and can "ensure[] fairness and consistency by minimizing the variability that can result from the application of a totality test." *Com. v. Powell*, 468 Mass. 272, 280–81 (2014) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180, 1187 (1989)). Here, creating a presumption against the admissibility of PPG evidence across all South Carolina courts will provide for that fairness and consistency.

Creating a presumption also furthers judicial economy. When interpreting and applying the law, courts may consider "the tenets of judicial economy." *See City of Rock Hill v. S.C. Dep't of Health & Enviro. Control*, 302 S.C. 161, 166, 394 S.E.2d 327, 330 (1990) (noting that a party's "construction" of the statute in question "would violate common sense *and the tenets of judicial economy*") (emphasis added); *see also State v. Dingle*, 376 S.C. 643, 652, 659 S.E.2d 101, 106 (2008); *Harden v. State*, 276 S.C. 249, 253, 277 S.E.2d 692, 693 (1981). Those tenets seek "to minimize duplication of effort and to avoid wasting the judiciary's time and resources." Judicial Economy, Black's Law Dictionary (12th ed. 2024). "[S]traightforward,

bright-line rule[s are] easy to administer," furthering those interests. *Lackey v. Stinnie*, 145 S. Ct. 659, 669 (2025). Specifically, a presumption against the admissibility of PPG evidence would reduce "the necessity for . . . complicated and prolonged . . . investigation into" the scientific underpinnings of PPG evidence in SVP trial after SVP trial. *See F.T.C. v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 430 (1990) (quoting *N. Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958), and weighing the "administrative efficiency interests").[5]

D. The Court's treatment of polygraph evidence provides a useful model for how to treat PPG evidence.

Since first considering the polygraph, the Court wisely prohibited its use at trial due to reliability concerns. *State v. Britt*, 235 S.C. 395, 111 S.E.2d 669 (1959). Not until deciding *State v. Council* did the Court remove the total prohibition against polygraph evidence, 335 S.C. 1, 24, 515 S.E.2d 508, 520 (1999), and now prudently continues to endorse a "general rule" that polygraph evidence is inadmissible under the *Council* analysis, *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007).

This general rule has relieved our courts of engaging in a burdensome analysis of a pseudoscientific test and promoted uniform rulings. The rule has protected both defendants and the State from the polygraph's questionable reliability and undeniable prejudicial effect. *E.g.*, *id.* (reversing conviction due to polygraph inadmissibility); *State v. McBride*, 416 S.C. 379, 393, 786 S.E.2d 435, 442 (Ct. App. 2016) (affirming conviction due to polygraph inadmissibility). But by stopping short of a *per se* rule, a general presumption accounts for the possibility that the science surrounding the polygraph will evolve.

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[5] The expense of indigent representation in SVP proceedings—including the assistance of counsel and access to "qualified evaluator[s]"—also falls to the State. *See* S.C. Code Ann. § 44-48-90(B)–(C). Unnecessary and repeated litigation regarding the admissibility of PPG evidence only increases these costs.

PPG evidence demands a similar rule. The resemblance between the two tests is undeniable. Like with the polygraph, the scientific community is sharply divided about the PPG's reliability. *Weber*, 451 F.3d at 564 (PPG); *Powers*, 59 F.3d at 1471 (PPG); *Council*, 335 S.C. at 23–24 (polygraph). This stems from a lack of standardization and a susceptibility to manipulation. *E.g., Weber*, 451 F.3d at 564–65 (PPG lacks standards and subject to manipulation); *Cordoba*, 194 F.3d at 1058–62 (polygraph lacks standards); *United States v. Alexander*, 526 F.2d 161, 167 (8th Cir. 1975) (polygraph subject to manipulation). And juries are likely to give both tests undeserved weight because of their scientific appearance. *Bilton,* 432 S.C. at 167 (PPG); *Alexander*, 526 F.2d at 167–168 (polygraph).

Implementing a presumption would provide the same benefits in the PPG context that it has provided in the polygraph context. The State would likely stop relying on PPG evidence (as they did in these cases) to override their first expert's opinion, and trial courts will be spared repeated and laborious analyses of a dubious test. This protects both parties from the risk of unfair prejudice and promotes fairness and uniformity, which are hallmarks of justice. Further, unlike a *per se* ban, this approach would merely create a presumption that PPG evidence is inadmissible. Thus, in the unlikely event that science eventually supports the PPG, our courts could account for that change. In short, it protects against all the risks Amicus has discussed, while allowing the law to develop alongside the science.

CONCLUSION

For these reasons, Amicus respectfully urges this Court to affirm the Court of Appeals' reversals of Respondents' SVP determinations and, further, to adopt a bright-line presumption against the admissibility of PPG evidence in future SVP proceedings in South Carolina.

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