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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable Bentley Price, Circuit Court Judge
Appellate Case No. 2024-000553

IN THE MATTER OF THE CARE AND TREATMENT
OF ROBERT BRIAN SHARP,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Judge Price did not abuse his discretion in admitting evidence regarding a PPG the State's expert used in formulating her opinion because the evidence established the PPG is recognized and accepted in the field of sex offender evaluation and treatment as a reliable, objective measure of deviant sexual interest.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS¹

In 2019, the Florence County Grand Jury indicted Appellant, Robert Brian Sharp, on multiple charges, including criminal solicitation of a minor, indecent exposure, and attempted kidnapping. On October 2, 2019, Appellant pled guilty to two counts of criminal solicitation of a minor and one count of indecent exposure and was sentenced to ten years' incarceration with credit for 697 days' time served. Prior to Appellant's release from incarceration, Respondent State of South Carolina initiated a civil action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Appellant's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on February 26, 2024, before the Honorable Bentley Price, Circuit Court Judge.

Pre-Trial Testimony and Ruling

Prior to trial, Appellant moved to exclude testimony regarding a penile plethysmograph (PPG) and requested a hearing pursuant to *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). (Record on Appeal [R.], pp. 542-549). In response, the State submitted a Memorandum in Support of the Admissibility of PPG Testimony of Dr. Emily Gottfried. (R., pp. 554-582). After swearing the jury, Judge Price commenced a *Council* hearing regarding reliability/admissibility of PPG evidence.

The State presented Emily Gottfried, Ph.D., of the Medical University of South Carolina (MUSC), who is the Director of MUSC's Sexual Behavior Clinic and Lab (SBCL). In addition to

¹ Appellant's purported "Statement of Facts" contains extremely argumentative statements that are not "factual." By way of example, Appellant states as "fact" that the State "misled the jury on the significant or meaning of Appellant's PPG results," and then "improperly implied that the PPG was an objective, scientific test like a drug test and that there could be no false positives." (Brief of Appellant, p. 8). Neither of those assertions are **factual** in nature but are merely Appellant's self-serving interpretations of the State's questions to a witness at trial. The State craves reference to the facts set forth below and the trial transcript for accuracy.

her administrative duties at the SBCL, Dr. Gottfried conducts research on paraphilic disorders and accurate assessments of sexual offense risk prediction and assessment in general. She has multiple peer-reviewed scholarly publications and presentations at scientific conferences and gives lectures on sexual behavior topics. (R., pp. 54-57).

Dr. Gottfried also sits on an international committee working on international PPG standardization, which she testified is complicated by the different countries' laws. She also testified another standardization issue is the cut scores used by different clinicians to determine a significant arousal. She stated the cut score is related to the purpose of the evaluation at issue and a more conservative cut score is appropriate if the evaluation is related to possible civil commitment versus treatment. (R., pp. 57-58).

Dr. Gottfried then described the PPG process in detail, and testified the PPG is part of the SBCL's standard protocol. She stated that a PPG is administered to every adult male who is evaluated at the SBCL and every PPG performed in the SBCL is done in the same way. She further testified that every person involved in administering PPGs in the SBCL is trained and certified to perform their tasks. The training consists of classroom instruction and hands-on experience. (R., pp. 59-62).

Dr. Gottfried testified that the PPG was developed in the 1950s and it has been peer-reviewed and accepted as a valid medical assessment by Blue Cross Blue Shield and the Federal Drug Administration has approved the PPG system the SBCL uses. (R., pp. 62-66, 407-418). She further testified about published articles, peer-reviewed and scholarly works she relies as a basis for continuing to use the PPG in her evaluations and presented Judge Price with a bibliography of thirty-five published articles and book chapters regarding the PPG. (R., pp. 66-67, 418-420).

Dr. Gottfried then testified about a 2019 meta-analysis that analyzed PPG results from multiple studies that included between 900 and 10,000 subjects. The analysis demonstrated that the PPG can reliably discriminate between men who have sexual interests in children and men who do not, and the results of that meta-analysis were just as large or larger than the other meta-analyses in looking at all of the risk factors for sexual recidivism. (R., pp. 67-68).

Dr. Gottfried stated she uses the PPG results as one data point in her evaluations, and because men being evaluated may not be totally forthcoming about their sexual arousals, it is important to have an objective way to measure their arousals. She testified that if a man reported he was aroused by children and he had acted on that arousal, the PPG would not be necessary, but the majority of people she evaluates do not self-report, but may admit it after she discusses the PPG results with them.

Dr. Gottfried identified State's Exhibit 5 as the SBCL PPG administration instructions that are followed during every PPG examination in the SBCL. The SBCL is certified by the PPG system manufacturer as a research and clinical laboratory, and the research certification means that the laboratory does everything standardly and allows the laboratory to share data in the manufacturers merged database. (R., p. 71-72, 421-428).

Dr. Gottfried testified the PPG is recognized in books, including a 2019 book specifically about sexually violent predator evaluations and the Diagnostic & Statistical Manual for Mental Disorders (DSM-5). The PPG is also discussed in the general sexual literature, and it is a standard assessment used to diagnose impotence, or if a patient is being considered for a penile implant or another treatment for erectile dysfunction. (R., p. 71).

Dr. Gottfried identified State's Exhibit 6 as a chapter from the Sexually Violent Predators: A Clinical Science Handbook that specifically addresses use of the PPG in sexually violent

predator evaluations and treatment. The author stated the PPG has treatment, risk assessment and diagnostic value. (R., pp. 72-73).

Dr. Gottfried then identified State's Exhibit 7 as an excerpt from the DSM-5-TR, and testified the DSM is published by the American Psychiatric Association and is an authoritative source used by anyone with a license to diagnose mental disorders. The DSM-5-TR states that the PPG is "most thoroughly researched and longest used psychophysiological measure." (R., pp. 73-75, 444-445).

Dr. Gottfried explained the Limestone Technologies PPG equipment and stimulus sets used in the SBCL, the Marshall set and the Real Child Voices (RCV) set. She identified State's Exhibit 8 as a list of peer-reviewed articles discussing the Limestone system. (R., pp. 75-78, 446).

Dr. Gottfried testified that someone cannot manipulate the results "because the results are numbers." She explained that labs may differ on what they deem to be clinically significant results, but the raw data (millimeters of change) does not change. (R., pp. 78-79).

Dr. Gottfried further explained that with any test, the person interpreting it has to decide what will constitute a positive or negative cut off score, or what is clinically significant or not, and if the preference is for more false positives or false negatives. At the SBCL, the PPG is only one data point in a comprehensive evaluation, and Dr. Gottfried uses a more conservative cut off score (5mm of circumference change) because in high stake evaluations under the SVPA, she would rather miss someone with a false negative than say someone is aroused by something when they are not (false positive). (R., pp. 79-80).

Dr. Gottfried then identified State's Exhibit 9 as a list of two references from peer-reviewed publication in which the SBCL PPG lab is specifically mentioned. Both papers compared international sexual behavior labs and the SBCL methods were discussed. The papers underwent

the peer-review process and the experts who reviewed them thought that it met the standard for publication. (R., pp. 80-81, 447).

When a person comes to the SBCL for an evaluation, the lab personnel initially go over a long consent form with the person that includes every test that might be administered, including the PPG. The person is allowed to ask questions about it, and if he agrees, the person initials each section and signs the form. Every day the person comes back to the SBCL for other parts of the evaluation, the personnel “re-read” the consent form, and the person signs it as a consent for the evaluation to continue at that time. (R., pp. 81-82).

On the day of the PPG, the person meets with the technician who gives the person standardized instructions, explains the test and answers any questions. The person is told to use the restroom and then taken into the private PPG room, given a flexible ruler and instructed to measure himself. After the person measures himself and covers up, the tech comes back to the room and based on the ruler measurement, selects the appropriate size strain gauge for the PPG. (R., pp. 82-83).

The person then watches an instructional video for the PPG that is included with the RCV set, which he can watch as many times as he wants to until he understands the instructions. The tech will also come back into the room and answer any questions the person may have. While the person is watching the video, the tech is in another room calibrating the strain gauge, which must be calibrated three times before the PPG will even start. (R., p. 83).

During the PPG, the person is in the room by himself and the tech is in another room. A camera monitors the person from the chest up, and the tech communicates with the person via intercom. The tech gives the person instructions and reminds him about tasks the person needs to perform during the PPG, such as press a button when the scenario becomes sexual or violent or

describe the scenario he just heard, which helps to ensure the person is paying attention. The tech also watches the physiological data because if the person becomes aroused, the penis has to return to baseline before the PPG can continue. (R., pp. 83-84).

The SBCL employs various quality control procedures for the PPG, including controlling the humidity and temperature of the PPG room. The lab also strictly follows a detailed checklist to ensure that each PPG is administered in the exact same standardized way. All lab personnel are trained and certified, and the lab is credentialed. There is a protocol in place for every aspect of the PPG to make sure that everything is standardized. (R., pp. 84-85).

In addition to the instructions to press a button or describe a scenario, there are countermeasures in place that can show if the person is attempting to manipulate the results. The person sits on a pad that measures their movement, such as flexing to create an arousal to something they are not aroused by. The pad also shows if the person sneezes which may move the penile gauge, and seeing all the movement data can help differentiate between an arousal and simple movement. A respiration strap shows if the person is holding their breath or breathing rapidly or shallowly, which could be a way to try to suppress an arousal. (R., pp. 85-86, 89).

Dr. Gottfried testified that the person is not required to self-stimulate at any point of the PPG. The pad they are sitting on would show if the person was trying to stimulate himself, which would invalidate the PPG. (R., pp. 86-87).

The PPG is used in sexually violent treatment programs in Minnesota, Missouri, Illinois, South Carolina, California, and New York. The PPG is also used extensively in Canada and the United Kingdom. Many researchers in the Czech Republic use it as well. (R., pp. 88-89).

Dr. Gottfried testified she is a member of the Association for the Treatment and Prevention of Sexual Abuse (ATSA), which is a national scientific professional organization for practitioners,

and she holds various leadership positions in the organization. ATSA publishes best practice guidelines for the assessment, treatment, and management of male sex offenders. The 2014 ATSA Practice Guidelines describes various tests and assessments for use in sexual behavior evaluations, and support the responsible use of the PPG in the treatment and assessment of male sex offenders. It describes ethical ways to administer and interpret a PPG, and caution that the PPG should never be used as the sole data point for any decision. The Guidelines also note that the PPG can be helpful in risk assessments, diagnosis, and treatment planning. (R., pp. 91-94, 448-457).

Dr. Gottfried testified that research on the PPG is continuing, and articles are published a few times a month about the ongoing research. The peer-reviewed articles discuss the PPG across the spectrum of sexual behaviors, and many were published in 2023 and 2024. Dr. Gottfried stated the PPG's reliability is well-established because it has been around for a long time, and some of the articles discussing sexual arousal use the PPG as the gold standard to measure that arousal. (R., pp. 94-95, 458-517).

Dr. Gottfried testified she conducts her own research on the PPG, reads all the published research on it, and consults with other professionals who work in the field. Sexual arousal to something other than consenting adult humans is a risk factor for recidivism of someone who has already offended, and she believes the PPG is the only way to validly assess what arouses a person who is not going to be totally forthcoming in a self-report regarding his arousal. She stated the PPG is generally accepted in the mental health community for both precommitment evaluations and treatment of sex offenders and in the wider medical community and is regularly used in sexual medicine. (R., pp. 95-96).

A PPG was conducted as part of Dr. Gottfried's evaluation of Appellant, and he showed clinically significant sexual arousal to two trials featuring consenting adult women, one trial

featuring prepubescent children, and one trial featuring pubescent or adolescent girls. Dr. Gottfried testified there was some evidence that Appellant tried to manipulate the PPG results. She ultimately diagnosed Appellant with pedophilic disorder, exhibitionistic disorder, and an alcohol use disorder and stated the PPG was just one of several data points she considered. She stated she also considered Appellant's officially reported sex offense behaviors, including victim statements and medical records, and asked Appellant about his sexual arousal history. She stated the PPG showed what Appellant was aroused to in the lab, which was consistent with his offense history. (R., pp. 96-99).

Judge Price took the matter under advisement overnight. When court convened the next morning, he ruled that the State had met its burden as to Dr. Gottfried's ability to testify about the PPG, and it was admissible. He further found that the PPG was not invasive under the Fourth Amendment. (R., p. 150).

Trial Testimony

Dr. Gottfried

Dr. Gottfried testified about her qualifications and was qualified as an expert in precommitment sexually violent predator cases. After she testified about the PPG in general, she was qualified as an expert in the use of the PPG. (R., pp. 169-173).

Dr. Gottfried then described her evaluation protocol, including all the documents she reviews, administering a battery of psychological tests, conducting a PPG, and interviewing the person. (R., pp. 173-176). She testified about Appellant's sexual offenses, which included 2 convictions for criminal solicitation of a minor, a sexually based assault and battery first degree conviction, and an indecent exposure conviction.

According to the official records Dr. Gottfried reviewed, Appellant was arrested in 2012 after he went into an eight-year-old female's bedroom while she was sleeping, removed her pajamas and pulled her vagina open with his fingers. He told Dr. Gottfried that he was curious about what a girl's vagina looked like, and he thought about doing it for approximately a month before he acted on it. The records indicated Appellant came into the girl's room a second time and the girl hid under the covers, and she ultimately called for her mother, who was Appellant's girlfriend at the time. Appellant pled guilty to assault and battery – first degree in connection with the offense. (R., pp. 178-179, 182-184, 518-541).

Dr. Gottfried testified that records indicated that after Appellant was arrested for criminal sexual conduct with a minor, the victim's mother reported to law enforcement multiple times that Appellant was constantly calling her at home and work and approaching her in public places trying to intimidate her to recant the charges. The records also indicated that while he was in jail on the sex offense charge, Appellant was charged with solicitation to commit murder after another inmate reported Appellant requested that he kill the victim's mother so the charges would "go away." Dr. Gottfried testified it was important to know all the person's criminal history to score certain risk assessments, and while it was not a sexual offense, it was a data point she considered. (R., pp. 179-181).

Dr. Gottfried testified that while he was on probation for the assault and battery conviction, and after he completed required sex offender treatment in the community, Appellant was arrested in 2017 on two counts of criminal solicitation of a minor and one count of indecent exposure. He told Dr. Gottfried he rode around in his car until he saw a woman or female child and he stopped to ask for directions or some other question. While he was riding around and then stopped, Appellant masturbated in his car until he ejaculated. He reported this happened with about six

victims. When one victim saw that Appellant's penis was exposed and he was masturbating, she reached through the car window, grabbed his penis and asked him if he needed help with that, which Appellant said shocked and scared him. Dr. Gottfried stated this conduct was significant because it occurred after Appellant had been sanctioned for a sex offense and was still on probation, and after he completed sex offender treatment. He continued to engage in this type of conduct even after being scared by the woman's reaction. She stated that suggested Appellant cannot control his behavior. (R., pp. 184-189).

In October 2017, Appellant was riding through a neighborhood and saw an 11-year-old girl riding her bike. He called the girl over to his car and asked if she had seen his dog. Appellant was masturbating and the girl saw his penis. Appellant drove off, and the girl ran home and told her parents. The girl's father got in his car and chased Appellant. Appellant reported he was driving a hundred miles per hour through the neighborhood and the girl's father fired a gun at him. Appellant told Dr. Gottfried that he ejaculated while he was fleeing from the scene. Dr. Gottfried testified that the fact Appellant continued masturbating to the point of ejaculation while in a high-speed chase with someone shooting at him suggested he had a hard time controlling his sexual behavior. Appellant told Dr. Gottfried he engaged in this type of behavior "every couple of days to a week, week and a half." (R., pp. 189-191).

On November 7, 2017, Appellant called a ten-year-old girl over to his car, showed her a picture of a dog and asked if she had seen it. The girl reported that Appellant had a sexual conversation with her, which Appellant confirmed with Dr. Gottfried. He told her that he asked the girl if she "liked dick" and she ran away at that point. When Dr. Gottfried asked Appellant why he engaged in that sexual conversation, he said he did not know. (R., pp. 191-192).

On November 13, 2017, Appellant approached a seven-year-old female and a nine-year-old female. He told Dr. Gottfried that he believed he asked them about his dog, and he was masturbating in his car while he talked to them. The girls said they had not seen his dog and then rode off on their bikes. Appellant was ultimately identified by video of his vehicle from a neighborhood camera. Appellant told Dr. Gottfried that “it was a dark time in his life,” and he attributed his conduct to being aroused by the fact that he was masturbating, and the girls did not know it. (R., pp. 192-195).

After testifying about the psychological tests she administered during Appellant’s evaluation, Dr. Gottfried testified about the PPG process for Appellant, including the consent form and the stimulus sets used during the PPG. She testified Appellant showed clinically significant sexual arousal to four of the PPG trials, two featuring consent adult women, one featuring a prepubescent child, and one trial featuring a pubescent female. She explained the cut score for a significant arousal and the countermeasures used to detect attempts to manipulate the PPG results. She stated Appellant moved around and held his breath during multiple trials and that could be an attempt to prevent arousal. (R., pp. 203-207).

Dr. Gottfried then testified about clinically scored risk assessments she used in Appellant’s evaluation. Appellant’s score on one measure, the Static-99R, was five, which placed him in the above average risk to reoffend category. (R., pp. 207-216).

Dr. Gottfried also considered dynamic risk factors not included in the Static-99R. She testified these are factors that can be targeted in treatment, including sexual offending cycle, treatment compliance, deviant sexual preference, sexual compulsivity, sexual preoccupation, intimacy deficits, compliance with community supervision, insight, cognitive distortions, and

substance abuse. She found Appellant had each of these dynamic risk factors which increases his risk to reoffend sexually. (R., pp. 216-224).

Based on all the testing and assessments, her review of the official records regarding Appellant's sexual offenses and general criminal history, and Appellant's statements during the interview, Dr. Gottfried diagnosed Appellant with pedophilic disorder and exhibitionistic disorder, and she concluded he is above to well above average risk to reoffend. She stated Appellant did not have good insight into why he offended, the disorders he has and the treatment he needs to keep other people safe, and she found it particularly concerning that Appellant completed sex offender treatment while on probation but continued to reoffend. She testified that Appellant has the propensity to reoffend, and he poses a menace to the health and safety of others if not committed to long term treatment, care and control. She further testified that all of her conclusions were to a reasonable degree of psychological certainty. (R., pp. 209, 224-226).

DMH Evaluator

An evaluator with the South Carolina Department of Mental Health (DMH) was qualified as an expert in sexually violent predator evaluations. She testified she was assigned to conduct Appellant's evaluation, and her evaluation protocol includes a review of all available documentation and an interview of the person. Based on the records and Appellant's interview, the evaluator concluded there was insufficient evidence to diagnose Appellant with any mental abnormality or personality disorder, and he did not meet the criteria for commitment under the SVPA. (R., pp. 270-300). On cross examination, the DMH evaluator testified that Appellant scored in the Well Above Average category to reoffend sexually as measured by the Static 2002-R actuarial. (R., pp. 304, 309).

Jury Verdict

After deliberating for over an hour, the jury found beyond a reasonable doubt that Appellant is a sexually violent predator as defined by the SVPA, and Judge Price committed him to DMH's custody for long term control, care, and treatment. (R., pp. 402, 582-584). This appeal followed.

STANDARD OF REVIEW

“The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice.” *State v. Jackson*, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009). “The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion.” *State v. Prather*, 429 S.C. 583, 840 S.E.2d 551, 559 (2020) (quoting *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336, 338 [2015]). “A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion,” which “occurs when the conclusions of the [trial] court are either controlled by an error of law or are based on unsupported factual conclusions.” *Id.* (alteration in original). See also, *State v. Wallace*, 440 S.C. 537, 892 S.E.2d 301, 307 (2023) (appellate courts will not reverse a trial court’s ruling on evidentiary issues unless the trial court did not act within the discretion granted to trial courts).

Appellate courts review Rule 403 rulings pursuant to an abuse of discretion standard and give great deference to the trial court. *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197, 199 (2007). A trial court’s decision regarding the comparative probative value and prejudicial effect of evidence should only be reversed in exceptional circumstances. *Johnson v. Horry County Solid Waste Auth.*, 389 S.C. 528, 698 S.E.2d 835, 838 (Ct. App. 2010); *State v. Lyles*, 379 S.C. 328, 665 S.E.2d 201, 207 (Ct. App. 2008) (“If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate court.”).

ARGUMENT

Judge Price did not err in admitting the PPG evidence because the PPG is reliable. 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. *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

The court must determine if the expert testimony is scientific in nature and if so, the court must determine its reliability. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). In determining the reliability of the testimony, the court must examine the following factors:

- (1) 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.

Council, 515 S.E.2d at 518.

When there is a challenge to a particular type of evidence, the court must exercise its gatekeeping function to make a preliminary assessment of admissibility. *Watson*, 699 S.E.2d at 174–75. As the Supreme Court has noted “[t]he proponent of scientific evidence has a corresponding responsibility to provide the trial court the factual and scientific information the court needs to carry out its gatekeeping duty.” *See State v. Phillips*, 430 S.C. 319, 334, 844 S.E.2d 651, 659 (2020). The Supreme Court further stated that “[i]n *Council*, *Graves*, and *Watson*, the proponent went to great lengths in a hearing outside of the jury's presence to

provide a sufficient factual and scientific basis for the court to consider as gatekeeper.” *Id.*

In this case, as in *Council, Graves, and Watson*, the State provided an expert witness, Dr. Emily Gottfried, who was qualified as an expert in the PPG, to give Judge Price a factual and scientific basis of the PPG. Moreover, the State made an effort to educate Judge Price on the factual and scientific basis of the PPG not only through testimony, but also documentary evidence relevant to the elements established by SCRE 702.

Noticeably absent from Appellant’s brief is any in-depth discussion or analysis regarding the extensive and **undisputed** expert pretrial testimony Judge Price heard from Dr. Gottfried regarding PPG testing reliability, including current and ongoing research, peer-reviewed articles and presentations, and her training on the operation of the PPG system and interpretation of PPG results. Understandably, Appellant also ignores the significant documentary evidence submitted during the pre-trial hearing that substantiated Dr. Gottfried’s testimony.

PPG Reliability/Admissibility

As set forth in detail above, Dr. Gottfried testified at the pretrial hearing about her first-hand training and experience, multiple research studies and publications regarding the reliability of the PPG test, the DSM-5 reference to the PPG test, and her active participation in ongoing national and international studies and scientific presentations regarding PPG testing and the stimulus sets used in the PPG test.² Dr. Gottfried then testified in depth regarding the SBCL protocols and quality control procedures used in every PPG test the lab conducts. (R. pp. 54-99). In addition to Dr. Gottfried’s testimony, the State submitted multiple exhibits at the pretrial hearing that supported her testimony

² By way of footnote, Appellant submits Dr. Gottfried was not qualified as an expert during the pre-trial hearing, but concedes she was qualified as an expert in precommitment sexual predator cases and use of the PPG during the trial. (Brief of Appellant, p. 5, n. 1). Dr. Gottfried’s undisputed pre-trial testimony clearly established her expertise in both areas, especially the PPG, and Appellant’s attempt to lessen the impact of her pre-trial testimony is an irrelevant red herring.

regarding the general acceptance of the PPG for sex offender evaluations and treatment, and the extensive SBCL quality control procedures for all PPG tests performed there. (R., pp. 407-517).

Rather than address the substance of Dr. Gottfried's pre-trial testimony regarding PPG reliability and how she uses it in the sex offender evaluations she conducts, Appellant cherry-picks Dr. Gottfried's testimony and takes her statements out of context. For instance, he asserts Dr. Gottfried "conceded that there is a lack of standardization in the stimulus sets used by PPG examiners." (Brief of Appellant, pp. 5-6). As a threshold matter, Appellant cites no testimony to support that statement. Indeed, when Dr. Gottfried **did** discuss standardization issues, she specifically referenced the ongoing efforts to standardize stimulus sets **internationally, not domestically**, and stated the biggest issue in that effort was that jurisdictions have different laws, such as Canada's ability to use child pornography in its PPGs which United States labs cannot use, and international labs are reluctant to change what has been working for them. (R., pp. 57-58).

Appellant also asserts Dr. Gottfried "admitted there is a lack of standardization in the scoring." When her testimony regarding scoring is viewed in context, however, it was an explanation of why different cut scores might be used rather than admission there was a standardization issue. She explained that the cut score used should depend on the reason for the PPG, such as treatment (a lower cut score) versus civil commitment (a more conservative cut score). Importantly, Dr. Gottfried testified that regardless of where the PPG is conducted or the chosen cut score, "the raw data" from the PPG "is not going to change" and the number as measured by the strain gauge "would be constant." (R., pp. 77-80). The fact that experts use different cut scores to determine significant results on any test does not render the underlying science behind the test itself unreliable, and it is something that can be addressed on cross-examination.

Appellant cites to *In the Matter of the Care and Treatment of Bilton*, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020) as support for his contention the PPG is unreliable. The court of appeals holding in *Bilton* is irrelevant to Judge Price’s findings in this case because Dr. Gottfried is trained to administer and interpret results of the PPG. In *Bilton*, the issue turned on whether an expert, with no PPG training or experience, could testify about a PPG performed by someone other than the expert herself. The court simply 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.” *Bilton*, 851 S.E.2d at 446.

Appellant’s argument relies solely on dicta from the *Bilton* opinion; however, the *Bilton* court expressly declined to take up the issue of reliability, stating some jurisdictions do not allow the PPG to be admitted while others have held experts can rely of the PPG as a basis of their opinion. *Id.* at 445. The court was clear that it was not ruling on the general admissibility of PPG evidence, however, stating “[w]e wish to emphasize that we are not called on to review whether some hypothetical procedure would qualify as a baseline demonstration that Bilton's PPG test results were reliable.” *Id.* at 446. Thus, the court left open the possibility that a proper foundation could support general admissibility of PPG evidence.

The first published opinion from a South Carolina appellate court holding that PPG evidence is unreliable and inadmissible was *In the Matter of the Care and Treatment of Daily*, 443 S.C. 557, 905 S.E.2d 310 (Ct. App. 2024), which was decided without oral argument, and filed in June 2024 after the trials in this case. *Daily* is now before the Supreme Court on certiorari.³ In addition, the

³ The Supreme Court also granted certiorari in the other two cases cited by Appellant in which the court of appeals, by unpublished opinions (without oral argument), reversed on the PPG issue. *In the Matter of the Care and Treatment of Williford*, Op. No. 2024-UP-270 (S.C. Ct. App. filed July 24, 2024) (reversing Judge Sprouse’s admission of PPG evidence), cert granted February 12, 2025 (Appellate Case No. 2024-001782); *In the Matter of the Care*

Supreme Court recently granted the State’s motion to certify the appeal of *In the Matter of the Care and Treatment of Pough*, (Appellate Case No. 2025-000548), in which the sole issue is the reliability and admissibility of the PPG. Thus, the issue of reliability and admissibility of PPG evidence in South Carolina is far from settled.

Appellant lists cases and articles cited in *Daily* as support for his argument the PPG is unreliable. Notably, the cases and articles cited are dated between 1989 and 2013, and do not account for the extensive PPG research conducted in recent years. Again, Appellant ignores the extensive evidence submitted during the pre-trial hearing in this case, which includes many recent published articles discussing studies of the PPG and concluding the PPG is a reliable, objective measure of male sexual arousal. (R., pp. 418-420, 458-517).

Appellant’s reliance on *Billips v. Commonwealth*, 274 Va. 805, 652 S.E.2d 99 (2007), is likewise unavailing. In *Billips*, the Virginia Supreme Court found that it was error to place the burden on the opponent of the evidence to establish the unreliability of the PPG rather than properly placing the burden of establishing the foundation of reliability on the proponent of the evidence. *Billips*, 652 S.E.2d at 102. The *Billips* court reasoned that because there is a risk laymen and jurors may be less skeptical of evidence that appears scientific; “we continue to require a “threshold finding of fact with respect to the reliability of the scientific method offered.” *Id.*

The Appellant’s claim that the *Billips* court “approached PPG testing with a critical eye and ultimately concluded it was inadmissible is misleading. (Brief of Appellant, p. 15). The *Billips* court held that the proponent of the evidence failed to carry its burden of establishing a threshold of

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 (Appellate Case No. 2024-001781).

reliability of the PPG evidence. In fact, the court noted “[t]he record is devoid of any evidence of the reliability of plethysmograph testing....” *Id.*

Unlike the proponent of the PPG evidence in *Billips*, in this case, the State provided extensive evidence through expert testimony and documentary evidence during a pre-trial hearing. Rather than attempting to analyze the evidence, Appellant merely makes conclusory statements that the PPG is “esoteric” and “junk science.” (Brief of Appellant, p. 15).

As evidenced by the State’s Exhibits submitted to Judge Price, the FDA has approved several PPG systems, including the Limestone system used in this case, and Blue Cross Blue Shield recognizes the PPG test as a medical procedure. (R., pp. 407-417). In addition, the Medicaid/Medicare regulations provide coverage for PPG tests.⁴ 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 test’s general acceptance in the mental health community is the reference to it in the DSM-5, which provides:

Psychophysiological measures of sexual interest may sometimes be useful when an individual’s history suggests 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). While previous DSM versions did not recognize the PPG test at all, by the time the DSM-5 was published in 2013, there was sufficient research indicating the PPG test’s validity as a tool to measure an individual’s sexual interest.⁵

⁴ 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>).

⁵ 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.” (R., pp. 444-445).

Contrary to Appellant’s conclusory arguments, there is ample evidence that the PPG test is widely researched and generally accepted in the medical and mental health fields. 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, 40th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers Presentation (September 2021).

Appellant asserts that the State misled and improperly implied that the PPG is an objective measure of arousal. 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 test “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 test 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) (“Phallometry, also known as penile plethysography or penile tumescence testing) is an **objective method** of assessing male sexual arousal.”).

Courts have also recognized the general acceptance and admissibility of the PPG test in sexually violent predator cases. 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.⁶ *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.⁷ *Id.*; see also *In re Detention of Herrick*, 198 Wash. App. 439, 393 P.3d 879, 885 (2017) (the PPG may provide critical information to an evaluator in determining if alleged sexual predator has a mental abnormality, and the PPG is an effective and generally accepted method for evaluating sex offenders).

The Illinois appellate court also found PPG evidence was admissible. See *In re Commitment of Sandry*, 367 Ill.App.3d 949, 857 N.E.2d 295, 316 (2006). As to the admissibility of a particular test or methodology, the court stated: “once it is determined that a methodology is generally accepted, it follows that it has achieved a sufficient degree of reliability and validity to cross the threshold of admissibility.” *Id.* at 309. The court then engaged in an exhaustive analysis of case law (use of PPG mentioned in at least 21 states, including South Carolina), statutes (eleven state statutes) and regulations, and discussed numerous academic articles that it determined provided ample support “to conclude that PPG testing is accepted by a substantial number of experts in this field such that it may be used to support a **qualitative assessment of the future dangerousness of an individual.**” *Id.* at 309-316 (emphasis added).

The *Bilton* court distinguished *Sandry* on the premise that “Illinois courts do not examine reliability before scientific evidence is admitted,” and did not even address all the case law and research articles discussed in *Sandry* that went directly to the issue of reliability. *Bilton*, 851 S.E.2d

⁶ 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. RCW §71.09.050(1). Thus, the Washington legislature recognized the PPG test is a valuable tool that should be available to evaluators if they believe it is necessary, and the Washington courts have found it to be reliable.

⁷ The *Bilton* court dismissed *Halgren* as distinguishable on the ground that the Washington court found the PPG was not novel and subject to the test for scientific evidence. This ignored the expressly stated reason for the Washington court’s finding, which was that the PPG had been analyzed in a previous case and found to be an effective method for assessing and treating sex offenders. *Halgren* at 719.

at 446. As with its dismissal of *Halgren*, however, the *Bilton* court's conclusion that Illinois courts do not examine reliability before scientific evidence is admitted ignored a very significant part of the *Sandry* opinion, which analyzed Illinois case law expressly stating “[t]he determination of the **reliability** of an expert's methodology is naturally subsumed by the inquiry into its general acceptance in the scientific community.” *Sandry*, 857 N.E.2d at 308 (quoting *Donaldson v. Central Illinois Public Service Co.*, 767 N.E.2d 314 [2002])(emphasis added). Thus, in examining whether the PPG is generally accepted in the scientific community, the *Sandry* court necessarily considered “reliability,” and its extensive discussion of evidence indicating the PPG is reliable and generally accepted is directly relevant here.⁸

Again, acknowledging some experts have criticized and rejected the PPG, the court noted the existence of contrary authority is not dispositive because 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).

Conversely, even scientific evidence, which is routinely accepted, such as DNA, is still challenged. The Supreme Court's reasoning in *Phillips* is on point with this case. Scientific evidence

⁸ The *Bilton* court also cited a concurring opinion in *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006) for the proposition that the PPG test is “Orwellian when, **as here**, the State compels the subject to arouse himself sexually and then forces him to view deviant stimulants.” 851 S.E.2d at 444 (emphasis added). This statement implied that MUSC required *Bilton* to masturbate prior to the PPG, which was inaccurate. There was no evidence in *Bilton*, and there is no evidence in this case, that MUSC requires the person to “arouse himself sexually” before beginning the test. To the contrary, Dr. Gottfried expressly testified MUSC's protocols do not include any masturbation requirement and any such self-stimulation would invalidate the test. (R., pp. 86-87).

is not admitted “every time a party offers [scientific] evidence”. *Phillips*, 844 S.E.2d at 663. “Rather, if an objection is made, the trial court must hold a *Daubert/Council* hearing, the proponent of the evidence must present the factual and scientific basis necessary to satisfy the foundational elements of Rule 702.” *Id.* In this case, Judge Price, properly exercised his gatekeeping function and held the requisite pretrial hearing, and the State offered extensive testimony and documentary evidence to establish the scientific basis of PPG reliability.

In psychosexual behavior evaluations, the PPG provides data that is 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., Measurement of Risk of Sexual Violence Through Phallometric Testing, *Legal Medicine* 11:368-369 (2009). “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 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) (the PPG “is invaluable in the **evaluation**, treatment and management of known sexual offenders.”) (emphasis added).⁹

Judge Price acted within the discretion granted to trial courts and his ruling regarding admissibility of evidence regarding Appellant’s PPG results is amply supported by the record. *See Wallace*, 892 S.E.2d at 312 (trial court’s ruling will not be reversed unless the court failed to act within the discretion granted to trial courts). Indeed, rather than even attempting to show Judge Price’s ruling is not supported by the extensive evidence presented, Appellant relies on mere conclusory assertions that the PPG is unreliable. Dr. Gottfried considered the PPG results as a single data point in a multi-faceted psychosexual evaluation, and without focusing on the PPG results, she testified about all the tests and information she considered in reaching her opinions regarding Appellant’s paraphilic coercive disorder diagnosis and his risk to reoffend sexually if not confined for long term control, care and treatment.

Appellant essentially seeks a *de novo* review rather than the appropriate abuse of discretion standard of appellate review. Under the abuse of discretion standard, Judge Price’s ruling that the State met its burden to show the PPG is reliable and admissible is well supported by the undisputed evidence and should be affirmed.

Probative/Prejudice & Harmless Error

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

⁹ The ATSA Best Practice Guidelines were recently updated, and it states “[t]he presence of age-inappropriate and non-consensual arousal has consistently been found to be a significant risk factor for sexual recidivism,” and the PPG “may be useful to evaluate a client’s sexual arousal response, particularly if a client’s sexual offending history or offense dynamics are indicative of a high level of risk and there is concern about the reliability of client self-report.” ATSA Best Practice Guidelines for Men (6th ed), pp. 36-37.

without the evidence.” Rule 401, SCRE. “Although relevant, evidence may be excluded if its probative value is **substantially** outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE (emphasis added).

In addition to making an essentially conclusory argument that the PPG evidence was unreliable and inadmissible, Appellant appears to address a potential harmless error analysis by quoting portions of Dr. Gottfried’s PPG testimony and the State’s closing argument references to the PPG. As argued above, the PPG evidence was properly admitted. Therefore, because there was no error, the references to it in testimony and closing argument were appropriate and a harmless error analysis is not necessary.

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).¹⁰ “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).

A “person’s dangerous propensities are the focus of the SVP Act.” *In re Care & Treatment of Ettel*, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008) (quoting *In re Care and Treatment of Corley*, 353 S.C. 202, 577 S.E.2d 451, 453 [2003]). To the extent Appellant is making a veiled Rule

¹⁰ All evidence is meant to be prejudicial; only unfair prejudice must be scrutinized. *See State v. Gray*, 408 S.C. 601, 759 S.E.2d 160, 168 (Ct. App. 2014).

403 probative versus prejudice argument, which requires him to show that the prejudicial effect “substantially” outweighed the evidence’s probative value, his argument fails.

The State was required to prove beyond a reasonable doubt that Appellant presently has a mental abnormality and/or personality disorder that makes him likely to engage in acts of sexual violence if not confined for long term control, care, and treatment. *See In re Care and Treatment of Taft*, 413 S.C. 16, 774 S.E.2d 462, 466 (2015) (the State must prove beyond a reasonable doubt that the person is presently a sexually violent predator). As recognized in the numerous publications provided to Judge Price and cited above, the PPG is highly and directly probative and relevant to the diagnosis and risk assessment of male sex offenders. *See Tong, Dean, supra* (PPG is an important first step in gauging propensity to reoffend).

In light of the elements the State must prove under the SVPA, the probative value of the PPG results as part of Dr. Gottfried’s evaluation and opinion cannot be seriously challenged. The PPG results were a part of her diagnostic and risk analysis, and it was important for the jury to hear about everything she did and considered in reaching her conclusions regarding Appellant’s diagnoses and risk to reoffend.

The PPG results were no doubt prejudicial to Appellant, but they were consistent with, and no more prejudicial than, his history of sexually molesting young females and riding around neighborhoods looking for more victims. Thus, the prejudice to Appellant did not substantially outweigh the evidence’s probative value. *See Heller*, 731 S.E.2d at 320 (determination of prejudicial effect against probative value must be based on the entire record and turns on the facts of each case).

Appellant’s statements to Dr. Gottfried and the facts of his sex offenses provide ample proof that he has incredibly strong deviant sexual urges and has acted on them, he was unable to control these urges after being sanctioned and attending sex offender treatment, and he has the propensity

to commit future acts of sexual violence to such a degree that he is a danger to public safety unless confined for treatment. In short, there was overwhelming evidence to support Appellant is a sexually violent predator beyond a reasonable doubt.

Dr. Gottfried considered the PPG results as one data point in a multi-faceted evaluation that included extensive testing, review of Appellant's records and the DMH evaluation, and a clinical interview of Appellant during which she reviewed his personal history with him, as well as his sexual offenses and all the test results. The fact that the PPG was not the primary basis for Dr. Gottfried's opinion is supported by the fact that she did not stress the PPG results in any way during her testimony.

The vast majority of Dr. Gottfried's direct testimony was devoted to her credentials and evidence **other than the PPG**. That testimony included: the facts of Appellant's sex offenses against female children; the battery of psychological tests in her evaluation protocol; Appellant's results on those tests; Appellant's statements to her during the clinical interview; her diagnosis of pedophilic disorder, exclusive type, sexually aroused to female prepubescent children; the actuarial risk assessments she used and Appellant's level of risk according to those assessments; Appellant's dynamic risk factors for reoffending; Appellant's need for treatment and lack thereof; and her ultimate opinion that Appellant met the criteria for civil commitment under the SVPA.

Further, the State briefly referenced the PPG during closing argument as only one data point in Dr. Gottfried's comprehensive psychosexual evaluation of Appellant. (R., pp. 367-368). The State focused instead on the thoroughness of Dr. Gottfried's evaluation as compared to the DMH evaluator's evaluation, Appellant's offenses, the fact that both experts testified Appellant was in the

well above average to reoffend category, and the basis for the DMH evaluator's opinion that Appellant did not need to be confined for treatment.¹¹ (R., pp. 368-375).

Even if the PPG evidence was improperly admitted and the Court determines a harmless error analysis is necessary, which the State does not concede, there was overwhelming evidence presented (other than the PPG) to support the jury's verdict. Appellant's statements to Dr. Gottfried during the interview clearly established that he was unable to control his sexually deviant urges, even after sanction and sex offender treatment. After his Assault and Battery – First Degree conviction and incarceration, Appellant rode around neighborhoods until he saw a woman or a child, stopped ostensibly to get directions or show a picture of a dog, and he masturbated to the point of ejaculation while talking to them. He told Dr. Gottfried he did this to about six victims. When one of his minor victims went home and reported it to her parents, the father chased Appellant through the neighborhood at a high rate of speed and purportedly fired shots at him, but Appellant continued to masturbate in the car during the chase until he ejaculated.

When viewed in light of the issues before the jury and the entire record, the evidence presented amply supports Judge Price's findings regarding the PPG test's reliability, the prejudice to Appellant arising from the PPG test evidence did not substantially outweigh the evidence's probative value, and there was substantial evidence presented other than the PPG evidence that support the jury's verdict that Appellant is a sexually violent predator beyond a reasonable doubt.

¹¹ Appellant asserts in his Statement of Facts that the State "emphasized the erroneously admitted PPG evidence" in closing by stating that Appellant "showed an increased *medically diagnosed objective* increase, in sexual arousal to prepubescent girls and pubescent girls." (Brief of Appellant, p. 9) (emphasis in original). Argument is not evidence, and again, context is crucial. The reference to a medical diagnosis was immediately preceded by the statements that "the PPG is a data point . . . [i]t doesn't say he's a pedophile . . . [h]is criminal history says he's a pedophile . . . [t]he PPG is simply a data point." Then immediately after the argument Appellant quotes, the State reiterated "[i]t's a data point." (R., pp. 367-368).

Thus, Judge Price's rulings and the jury's verdict that Appellant is a sexually violent predator as defined by the SVPA should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits Judge Price's ruling and Appellant's civil commitment pursuant to the SVPA should be affirmed.

Respectfully submitted,

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August 4, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable Bentley Price, Circuit Court Judge
Appellate Case No. 2024-000553

IN THE INTEREST OF THE CARE AND TREATMENT
OF ROBERT BRIAN SHARP,

APPELLANT


PROOF OF SERVICE

I, Abigail Hawley-Browder, certify I served the Final Brief of Respondent on Appellant by email to the Appellant's counsel at the address reflected in the AIS system. The Final Brief has also been filed with the Court of Appeals through the e-filing system.

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I further certify that all parties required by Rule to be served have been served.

This 4TH day of August, 2025.


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Abigail Hawley-Browder

From: Abigail Hawley-Browder
Sent: Monday, August 4, 2025 1:34 PM
To: Chris Runyan
Subject: Sharp FBOR
Attachments: SHARP FBOR.pdf

Here is the Final Brief for Sharp.

Thanks,

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