

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**RECEIVED**  
**Nov 25 2020**  
**SC Court of Appeals**

Appeal from Horry County  
The Honorable Williams H. Seals, Circuit Court Judge  
Appellate Case No. 2017-001464

IN THE MATTER OF THE CARE AND TREATMENT  
OF MICAH ALLEN BILTON,

Appellant.

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**RESPONDENT'S PETITION FOR REHEARING**

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On October 14, 2020, this Court reversed Appellant's commitment as a sexually violent predator, finding the trial court erred by allowing the court appointed evaluator, Amy Swan, Ph.D., to testify about the results of a penile plethysmograph (PPG) test performed by another doctor at her request. The Court's due process analysis misapprehended or overlooked a significant preservation issue, as well as case law and research regarding the efficacy of the PPG in evaluating an offender's risk to reoffend, which is at the heart of the Sexually Violent Predator Act (SVPA). Accordingly, pursuant to Rule 221(a), SCACR, the Respondent hereby moves for a rehearing on the grounds set forth below.

1) Appellant contended on appeal the circuit court violated his due process rights by allowing Dr. Swan to testify about the results of Appellant's PPG test, which she relied on in reaching her diagnosis and risk assessment. He asserted the evidence was inadmissible because: 1) Dr. Swan did not personally conduct or observe the PPG; 2) Appellant was unable to confront the person who performed the PPG; and 3) the PPG performed was unreliable because it had not been peer reviewed. Appellant did not assert the due process and PPG reliability claims in the trial court. Therefore, as argued in the Brief of Respondent and below, those issues are not preserved for appellate review

“In order to be preserved for appellate review, an issue must have been raised to and ruled upon by the trial court, and issues not raised and ruled upon in the trial court will not be considered on appeal.” State v. King, 424 S.C. 188, 818 S.E.2d 204, 209 (2018) (*quoting* , 356 S.C. 138, 587 S.E.2d 691, 693094[2003]). While a party does not need to use the exact name of a legal doctrine in order to preserve it, the **specific grounds** for the issue raised must be clear from the argument presented, and raised with **sufficient specificity** to bring into focus the **precise** nature of the alleged error so the court can reasonably understand it. State v. Daise, 421 S.C. 442, 807 S.E.2d 710, 714 (Ct. App. 2017); State v. Passmore, 363 S.C. 568, 611 S.E.2d 273, 281 (Ct. App. 2005); State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691, 694 (2003); *see also* State v. Cain, 419 S.C. 24, 795 S.E.2d 846, 851 (2017) (issue preservation also applies to constitutional issues); State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16, 19 (2011) (same). Further, a party may not argue one ground before the trial court, and argue a different ground on appeal. State v. Byram, 326 S.C. 107, 485 S.E.2d 360, 363 (1997).

At trial, Appellant moved to exclude the PPG evidence on the following **expressly** stated grounds: 1) violation of the “Fourth Amendment rights of search and seizure;” 2) violation of

the Fifth Amendment protection against self-incrimination; and 3) violation of the Sixth Amendment Confrontation Clause. (R., pp. 17-20). He never asserted admission of the evidence would violate his right to “due process” under the Fifth or Fourteenth Amendments. In reversing the circuit court, this Court ignored the fact the due process issue Appellant asserted on appeal, on which this Court relied in its analysis, was not preserved for appellate review.

2) The Court’s dicta regarding the reliability of the PPG in general addresses another issue not raised in the circuit court. Appellant did not challenge the PPG testimony on the ground the PPG is unreliable in general; rather, he objected to Dr. Swan testifying about the PPG performed on him in light of his Fourth Amendment and Confrontation Clause objections, and the fact she did not perform Appellant’s PPG, or observe its administration.

In its opinion, the Court stated it was dealing with “a narrow question” regarding the admissibility of Dr. Swan’s testimony about the PPG test results: specifically whether her testimony was inadmissible because “the test was not performed by Dr. Swan;” and “there was no demonstration that Bilton’s test was reliable beyond Dr. Swan’s statements that she was familiar with Dr. Burke’s work and nothing in Bilton’s test results indicated there were problems with his test.” Rather than limit its analysis to the stated “narrow issue,” however, the Court broadly analyzed some case law from other jurisdictions regarding the PPG’s reliability in general. If Dr. Swan’s testimony was a “conduit” for hearsay because she was unfamiliar with Dr. Burke’s methodology, and had limited knowledge of the administration of PPGs in general, the reliability of the PPG in general is irrelevant, and the Court’s analysis of that issue was gratuitous in that it exceeded the scope of appellate review. See Kennedy v. South Carolina Retirement System, 349 S.C. 531, 564 S.E.2d 322, 323 (2001) (“[A]ppellate courts, like well

behaved children, do not speak unless spoken to and do not answer questions they are not asked.”) (*quoting State v. Austin*, 306 S.C. 9, 409 S.E.2d 811, 817 [Ct. App. 1991]).

3) To the extent the PPG reliability in general may have been at issue, which the State disputes, the Court overlooked and/or misapprehended the case law and research articles on that exact issue cited in the Brief of Respondent. Relying almost exclusively on Commonwealth v. Ortiz, 100 N.E.3d 790 (Mass. 2018), the Court broadly asserted the case law from other jurisdictions was “nearly uniform” in rejecting the PPG.<sup>1</sup> The Court then went to great lengths to distinguish cases cited by Respondent that **directly** address the **general acceptance and reliability of the PPG**. Further, the Court completely ignored the extensive PPG research and scholarly articles Respondent cited, reducing Respondent’s arguments to relying “chiefly” on the Diagnostic and Statistical Manual, Fifth Ed. (DSM-V). *See* Brief of Respondent, pp. 11-15.

4) The inaccuracy of the Court’s analysis is amply demonstrated by its reference to, and reliance on, United States v. Weber, 451 F.3d 552 (2006). The Court cited Weber for the proposition the PPG is “Orwellian when, as here, the State compels the subject to arouse himself sexually and then forces him to view deviant stimulants so the State can get a sense of the person’s pre-dispositions and, potentially, use those pre-dispositions against him.” Bilton, 2020 WL 6051165 at \*2. Even assuming the Weber opinion may have reflected the general method of administering a PPG at some point, it is no longer an accurate representation. To the contrary, modern PPG procedures **prohibit** the Weber court’s representation of PPG administration procedures.

**First, current PPG administration does not require the examinee to masturbate: in fact, it is prohibited to manually manipulate the penis or the device during testing.** The sensitive nature of the gauge would immediately

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<sup>1</sup>Significantly, Appellant did not cite Ortiz as authority in his brief, submit it as additional or supplemental authority prior to oral argument, or raise it during oral argument.

signify to the technician if the device is being touched or manipulated. An example of this misunderstanding is illustrated in the following quote: “[...] a prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmograph testing crosses it.” (US v. Weber, 2006, p. 571). Additionally, the belief that examinees must masturbate for the examination has been repeated in other cases (e.g., US v. McLaurin, 2013).

Murphy, L., Gottfried, E., DiMario, K., Perkins, D., & Fedoroff, J.P., *Use of penile plethysmography in the court: A review of practices in Canada, the United Kingdom, and the United States*, *Behavioral Sciences and the Law*, 38: 79-99 [93] (2020).

Further, even though the Weber court expressed concerns regarding the invasive nature of the PPG and issues regarding potential manipulation of the test, the court acknowledged the PPG’s recognition as a useful technique in the treatment of sex offenders. 451 F.3d at 555. If the PPG is a valuable tool for sex offender treatment, the only logical conclusion is that it is equally as reliable and valuable as part of a comprehensive psychosexual evaluation and risk assessment, which can then serve as a baseline for subsequent treatment.

5) As cited and discussed at length in the Brief of Respondent, numerous research articles both before and after Weber, concluded the PPG is a reliable, objective assessment of sexual arousal, and it is the best means to objectively measure deviant sexual interests.<sup>2</sup> In addition, the United States government and private insurance companies recognize the PPG as a valid medical procedure, and either provide or exclude coverage for it, and the DSM-V acknowledges the PPG is “the most thoroughly researched and longest used of [psychophysiological] measures.” (Brief of Respondent, pp. 11-14).

6) The Court’s assertion courts have “uniformly” excluded PPG evidence likewise misapprehends or ignores significant case law to the contrary. In the Brief of Respondent, the

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<sup>2</sup>The PPG has been called the “gold standard” for measuring deviant sexual arousal profiles. Murphy, L., *et. al.*, *supra*, at 94.

State cited In re Detention of Herrick, 393 P.3d 879 (2017), In re Detention of Halgren, 132 P.3d 714 (2006), and In re Commitment of Sandry, 858 N.E.2d 295 (2006), for the courts' in-depth discussions regarding the general acceptance and reliability of the PPG for diagnostic and recidivism risk assessment purposes. Rather than address those significant aspects of the Halgren and Sandry opinions, however, as well as the research articles, statutes, regulations and cases cited therein, the Court "distinguished" the cases on the grounds Illinois courts (Sandry) do not examine reliability before scientific evidence is admitted, and the expert in Halgren (Washington) did not testify the PPG results were directly related to a sex offender's risk to reoffend.<sup>3</sup> Those distinctions are essentially irrelevant but for the Court's broad analysis of the PPG general reliability issue, which was outside the "narrow" issue the Court claimed to address.

In addition to the cases cited by the State in the Brief of Respondent, state and federal courts have held the PPG test is admissible for various purposes. *See* Murphy, L., *et. al.*, *supra* at 90-91 (discussion of state and federal cases analyzing the admissibility of PPG test results). The State readily acknowledges experts and courts differ regarding the reliability and admissibility of the PPG, but courts have not "uniformly" rejected admission of the PPG.

7) The impact of the Court's dicta regarding the PPG is already a reality in the circuit court. Within the last two weeks, a circuit court judge in a SVP commitment trial excluded testimony regarding a PPG test based on the Court's opinion in this case. The circuit court judge acknowledged the reliability of the PPG in general was **not** the holding of the case, but opined this Court included dicta regarding the reliability of the PPG in general "for a reason," and the

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<sup>3</sup>The Court did not even address the Herrick case, in which the Washington court stated: "Although Herrick identifies criticisms of PPG testing, he does not established that it is no longer accepted in the scientific community or authorized in case law." As evidenced by the articles and cases cited in the Brief of Respondent and herein, the scientific community's recognition, acceptance and use of the PPG has significantly increased.

circuit court judge cited directly to this Court’s discussion of Ortiz. The circuit court made its ruling in spite of the fact Dr. William Burke, who performed the PPG at issue in the case, testified pre-trial about the PPG reliability generally, and his administration of the specific PPG in the case.

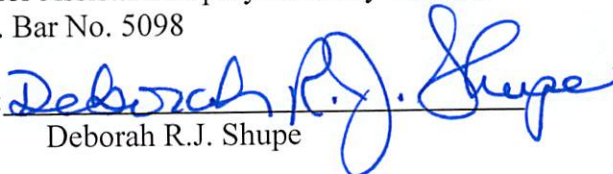
According to the Court’s analysis and **holding** in this case, Dr. Burke was the missing link at trial, and his absence rendered Dr. Swan’s testimony about the PPG inadmissible as a “conduit” for hearsay. The circuit court’s interpretation of the implicit message conveyed by the Court’s dicta starkly reveals the opinion in this case goes far beyond the “narrow issue” regarding admissibility of “conduit” hearsay testimony. Therefore, at a minimum, the Court should clarify that portion of its opinion.

Based on the foregoing, as well as the citations and arguments set forth in the Brief of Respondent, the State respectfully requests the Court grant rehearing and, at a minimum, clarify and limit the scope of its holding to the “narrow issue” regarding “conduit” hearsay in this case.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 25, 2020

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**SC Court of Appeals**

Appeal from Horry County  
The Honorable William H. Seals, Circuit Court Judge  
Appellate Case No. 2017-001464

IN THE MATTER OF THE CARE AND TREATMENT  
OF MICAH ALLEN BILTON,

Appellant.

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**PROOF OF SERVICE**


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I, Sally Ellison, certify I served the Respondent's Petition for Rehearing on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

David Alexander  
Assistant Appellate Defender  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

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

This 25<sup>th</sup> day of November, 2020.



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**Sally Ellison**

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**From:** Sally Ellison  
**Sent:** Wednesday, November 25, 2020 12:46 PM  
**To:** 'dalexander@sccid.sc.gov'; Matthews, Lindsey  
**Cc:** Deborah Shupe; Victim Services; Sally Ellison  
**Subject:** In the Matter of the Care and Treatment of Micah Bilton, Appellate Case No. 2017-001464  
**Attachments:** Bilton Micah Letter Serving Petition for Rehearing Appellate Case No. 2017-001464 (02435792xD2C78).pdf; Bilton Micah Respondent's Petition for Rehearing Appellate Case No. 2017-001464 (02435785xD2C78).pdf

Good Afternoon:

Attached for service this date is the Respondent's Petition for Rehearing in the above appeal, along with the State's cover letter. This Petition will be filed today with the Court of Appeals through the AIS One Drive System. A copy of the Petition will also be served upon you as indicated on the Proof of Service.

Please confirm receipt of this email.

*Sally Ellison*  
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**Nov 25 2020**  
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