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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Chesterfield County
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 2024-UP-046 (S.C. Ct. App. Filed February 7, 2024)

Lower Court Case No. 2018-GS-43-00206

THE STATE,

RESPONDENT,

V.

JAMES L. GINTHER,

PETITIONER.

APPELLATE CASE NO. 2019-000672

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James L. Ginther, Appellant.

Appellate Case No. 2019-000672

Appeal From Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2024-UP-046
Submitted January 1, 2024 – Filed February 7, 2024

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General J. Anthony Mabry, all of Columbia; and Solicitor Ernest Adolphus Finney, III, of Sumter, all for Respondent.

PER CURIAM: James L. Ginther appeals his convictions for murder and kidnapping, and sentence of life imprisonment without parole. On appeal, he argues (1) the trial court erred in refusing to limit a forensic firearms examination expert's opinion testimony to "consistencies" between test-fired shell cartridges from Ginther's gun and a fired shell cartridge found at the crime scene, and (2) the trial court erred in admitting irrelevant, confusing, and misleading still shots of a car from a traffic camera in Columbia. We affirm pursuant to Rule 220(b), SCACR.

1. We hold the trial court did not abuse its discretion in admitting opinion testimony from a witness qualified as an expert in forensic firearms examination that Ginther's gun fired a shell cartridge found at the crime scene. *See State v. Wallace*, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023) ("We review a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of Evidence—under an abuse of discretion standard."); *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018) ("A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law."). Ginther did not object to the expert's qualification or the reliability of the methodology used to form the expert's opinion. *See* Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *Wallace*, 440 S.C. at 544, 892 S.E.2d at 313 ("To admit expert testimony under Rule 702, the proponent—in this case the State—must demonstrate, and the trial court must find, the existence of three elements: 'the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.'" (quoting *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999))). With no challenge to the expert's qualification or methodology, there was no reason to limit the expert's testimony to "consistencies" between the fired shell cartridge found at the crime scene and the test-fired shell cartridges from Ginther's gun. *See State v. Hackett*, 215 S.C. 434, 445, 55 S.E.2d 696, 701 (1949) (explaining that courts "allow the introduction of expert testimony to show that the bullet which killed the deceased was fired from a particular pistol or rifle . . . [if] the witness . . . is, by experience and training, qualified to give an expert opinion in the field of ballistics.").[1]

---

[1] To the extent Ginther argues the trial court erred by failing to conduct a hearing on the reliability of the methodology used by the expert pursuant to *Watson v. Ford*

2. We hold the trial court did not abuse its discretion in admitting still shots from a traffic camera video because the still shots were relevant and their probative value was not substantially outweighed by the danger of misleading the jury or confusing the issues. *See State v. Phillips*, 430 S.C. 319, 340, 844 S.E.2d 651, 662 (2020) ("We review a trial court's decision to admit or exclude evidence under a deferential standard for an abuse of discretion."). The still shots showed a car similar to Ginther's driving from the direction of Ginther's home towards Sumter—where his ex-wife was later found deceased, at 12:51 a.m.—at a time that would have corresponded with her early-morning murder. Therefore, the still shots were relevant because they tended to show Ginther was travelling towards Sumter at a crucial time. *See* Rule 401, SCRE ("'Relevant evidence' means 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 without the evidence."). Next, although their probative value was low due to the still shots not showing any identifying characteristics of the car or its driver, their risk of confusing the issues or misleading the jury was also low because the jury had the ability to weigh the evidence and make conclusions about the identification of the driver or car. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues[] or misleading the jury . . . ."); *State v. Gray*, 438 S.C. 130, 144, 882 S.E.2d 469, 476 (Ct. App. 2022), *cert. denied* (Oct. 3, 2023) (holding the danger of confusing or misleading the jury was limited despite the surveillance video's low quality making it "difficult to discern what happened" because the jury could replay the video as often as it needed). Thus, the danger of confusion of the issues or misleading the jury did not substantially outweigh the still shots' probative value.

AFFIRMED.[2]

WILLIAMS, C.J., and HEWITT and VERDIN, JJ., concur.

Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), and by failing to limit the expert's testimony to "a reasonable degree of ballistic certainty," we hold these issues are not preserved for appellate review. *See State v. Sweet*, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007) ("To properly preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court[.]"); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector.").

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAMES L. GINTHER,

PETITIONER

APPELLATE CASE NO. 2019-000672

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

Opinion No. 2024-UP-046

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, James L. Ginther, respectfully requests that this Court grant rehearing. On February 7, 2024, this Court affirmed Petitioner's conviction for murder and kidnapping. State v. James L. Ginther, No. 2024-UP-046 (S.C. Ct. App. February 7, 2024). Counsel respectfully submits that this Court overlooked the fact that the challenge was to the scope of the expert's testimony not to his qualification as an expert or to the general methodology used. The motion to limit the expert's testimony did not require an objection to qualification or general ballistic methodology. Additionally, counsel respectfully submits that this Court overlooked the fact that once the motion to limit the witness's testimony was made, the

trial judge was required to conduct a hearing and the State, as the proponent of the expert testimony, had the burden to prove that the witness's testimony that a particular firearm fired a particular fired cartridge case was within the scope of the witness's expertise. The trial judge abandoned his duty as gatekeeper pursuant to Rule 702, SCRE, and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010), when he failed to conduct a hearing and require the State to show that the testimony was within the scope of the witness's expertise. The issue is preserved for appellate review. Petitioner respectfully requests rehearing.

Argument

The jury found Petitioner guilty of the murder of his former wife who died from a single gunshot wound to the head. (R. p. 370, lines 1-8). Her body was found by a hunter in the woods in the Wedgefield area of Sumter County after Ms. Ginther did not arrive at her job that morning at Pet Smart in Columbia. (R. pp. 268-269; p. 148, lines 18-23). One shell casing was found in the woods near her body. (R. p. 177, line 23 – p. 178, lines 1-13). The shell casing was submitted to Agent Chad Smith of SLED's Forensic Services Laboratory. (R. p. 411, line 8 – p. 412, lines 1-2; p. 413, lines 1-7). The shell casing was admitted in evidence, without objection, as State's exhibit #72. (R. p. 413, lines 14-19). The nine-millimeter Luger Glock firearm found when the officers took Petitioner into custody in Kentucky was also submitted to Agent Smith. (R. p. 412, lines 5-8). The firearm was admitted in evidence, over objection, as State's exhibit #68. (R. p. 410, lines 6-13). Agent Smith was offered as an expert in the field of forensic firearms examination without objection. (R. p. 421, lines 8-11).

Prior to Agent Smith's testimony Petitioner made the following objection:

> The other report where Item One - - where basically the forensic examiner tested the cartridge case. He claims that matching an individual identifying characteristic were found and it was concluded that Item One was fired by Item 19.

> My objection would be that - - I've consulted with an expert, my own, Richard Earnest. Through my consultation with him and through my - - now, this is not South Carolina precedent, but there is a case; United States v. Green Federal Case. That kind of language that that firearm fired that cartridge case to the exclusion of other firearms in the world I think - - I don't know if he can actually make that claim.
>
> I think that's beyond the scope of what he can say. He can say that there are things that match up. There are things that are consistent, but I don't think he can say that conclusory language. If that report comes into ėvidence I will object at that point.

(R. p. 392, line 23 – p. 393, lines 1-15). The State responded telling the judge, "Your Honor I don't think I intend to put in his report, the written report. But I do plan on asking him whether the cartridge found near the body was examined and compared to the gun taken from the Defendant. And my anticipation is he's going to say it was examined microscopically and determined to be fired by that gun." (R. p. 393, lines 17-23). The judge ruled, "I understand. Whatever he says you can cross-examine him on it. I mean based on what information you have. I mean assuming the question is proper and you can object to the question or form of the question, but it's his opinion if he's qualified to give one you can obviously cross examine him on that. Whether it's accurate or not or whatever." (R. p. 394, lines 1-7).

The trial judge erred in refusing to limit the opinion testimony of the expert witness in forensic firearms examination to consistencies in the comparison of the firearm and the shell casing without conducting a hearing and requiring the State to show that the testimony was within the scope of his expertise. In State v. Phillips, 430 S.C. 319, 334–35, 844 S.E.2d 651, 658–59 (2020), the South Carolina Supreme Court wrote:

> We have repeatedly discussed the trial court's "gatekeeping" role regarding the admission of expert testimony. In Council, for example, we framed our discussion around the trial court's responsibility to ensure the expert testimony meets the requirements of Rules 702 and 403. We emphasized "the trial judge must find" the Rule 702 elements are satisfied. 335 S.C. at 20, 515 S.E.2d at 518. We held, "The trial judge should ... determine reliability," and "the trial judge should determine if its probative value is [substantially] outweighed by" the dangers listed in Rule 403.

> Id. We have repeatedly enforced the requirement that trial courts exercise their gatekeeping responsibility in admitting expert testimony. See, e.g., Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012) (affirming the trial court's exclusion of the plaintiff's experts' opinions and stating "the court must ... exercise its role as gatekeeper"); Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010) (reversing the trial court's failure to exercise its role as gatekeeper and stating "the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law").

The trial judge erred in not conducting a hearing when Petitioner challenged testimony linking a particular firearm to a particular casing as outside the scope of the expert's testimony. The trial judge erred in not requiring the State to try and prove that the testimony was within the scope of the expert's testimony. As the Court wrote in Phillips:

> The 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. In 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. In Council, the State presented live, detailed testimony from the FBI expert explaining the history of the mitochondrial DNA analysis method, his training in the method, and precisely how the method is used. 335 S.C. at 17-18, 515 S.E.2d at 516-17. Similarly, in Graves and Watson, the civil plaintiffs who sought to introduce the opinion testimony presented deposition testimony of their experts and/or live testimony outside the presence of a jury,[7] and each expert explained in detail the factual and scientific basis for their opinions. Graves, 401 S.C. at 70-72, 735 S.E.2d at 653-54; Watson, 389 S.C. at 447-48, 699 S.E.2d at 176.

430 S.C. at 334–35, 844 S.E.2d at 658–59. While the Phillips case involved DNA evidence, the same analysis is applicable to the forensic firearm examination testimony in the present case. The State in the present case failed to provide the trial court with the factual and scientific information the court needed to carry out its gatekeeping duty. The agent's qualification as an expert was not challenged and he was only asked about the number of times he had testified in court. The trial

court was not provided with any information about the scope of his expertise. (R. p. 421, lines 1-13).

During the direct examination of Agent Smith the State asked, "All right. Did you come up with a conclusion as to whether that fired casing was fired by that Luger?" (R. p. 422, lines 4-5). Agent Smith testified that he had made a conclusion and when asked about his conclusion, Petitioner objected. (R. p. 422, lines 6-9). The judge overruled the objection. (R. p. 422, line 10). Agent Smith then testified, "Yes, sir I was able to conclude that the fired cartridge case submitted as State's Exhibit 72 was fired by this particular firearm, State's Exhibit 68." (R. p. 422, lines 11-13).

On re-direct examination the State asked, "Agent Smith, just to be clear cause that was a lot of technical information. Your expert opinion is that that Glock firearm fired the casing and made the impressions on the back of the casing?" (R. p. 433, lines 11-14). Petitioner again objected and the objection was overruled. (R. p. 433, lines 15-16). Agent Smith answered, "Correct. That would be my conclusion that State's Exhibit 72, that would be the fired cartridge case I received was fired by this particular gun." (R. p. 433, lines 17-19). The Solicitor then referenced the match in closing argument. (R. p. 623, line 25 – p. 624, lines 1-8). The trial judge erred in allowing the agent to testify that the Glock fired the shell casing found near the body without requiring the State to show that this testimony was within the scope of the witness's testimony. Agent Smith's testimony should have been limited to the consistencies in the comparison of the firearm and the shell casing.

While firearm identification testimony has generally been found admissible, the reliability of this kind of expert testimony has come under scrutiny. See David H. Kaye, Firearm-Mark

Evidence: Looking Back and Looking Ahead, 68 Case W. Res. L. Rev. 723, 724 (2018). As the United States District Court for the District of Massachusetts wrote:

> Courts have understandably been gun shy about questioning the reliability of firearm identification evidence. See Santiago, 199 F.Supp.2d at 111–12 ("The Court ... can only imagine the number of convictions that have been based, in part, on expert testimony regarding the match of a particular bullet to a gun seized from a defendant or his apartment."). Accord United States v. Foster, 300 F.Supp.2d 375, 377 n. 1 (D.Md.2004) (noting that "[b]allistics evidence has been accepted in criminal cases for many years"); United States v. O'Driscoll, 2003 WL 1402040 at *1, 2003 U.S. Dist. LEXIS 3370 at *4 (M.D.Pa. Feb. 10, 2003). Storm clouds, however, are gathering. See Sexton v. State, 93 S.W.3d 96 (Tex.Cr.App.2002) (rejecting matching of cartridge cases based on magazine marks alone without recovery of underlying magazine); Ramirez v. State, 810 So.2d 836 (Fla.2001) (rejecting toolmark analysis matching knife to fatal stab wounds).

United States v. Monteiro, 407 F. Supp. 2d 351, 364 (D. Mass. 2006)(n. 1 citing United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005) omitted).

In limiting the firearm identification testimony in United States v. Green, 405 F. Supp. 2d 104, 124 (D. Mass. 2005), the United States District Court for the District of Massachusetts wrote:

> Putting together this precedent with the evidence I have heard, suggests admission but with limitations, limitations identical to those I adopted in *Hines.* O'Shea is a seasoned observer of firearms and toolmarks; he may be able to identify marks that a lay observer would not. But while I will allow O'Shea to testify as to his observations, I will not allow him to conclude that the match he found by dint of the specific methodology he used permits "the exclusion of all other guns" as the source of the shell casings. Defense will be permitted full and fair cross-examination.

Agent Smith's qualification as an expert in forensic firearms examination was not challenged. As an expert the agent could testify about consistencies observed. As in Green, however, Agent Smith should not have been allowed to testify, as he did, that the match was to the exclusion of all other guns when the State failed to prove that this testimony was within the scope of the witness's expertise.

In limiting the firearm identification testimony in Monteiro the Massachusetts District Court explained that, "[b]ecause an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty[,]" and "[a]llowing the firearms examiner to testify to a reasonable degree of ballistic certainty permits the expert to offer her findings, but does not allow her to say more than is currently justified by the prevailing methodology." 407 F. Supp. 2d at 372. The agent's testimony in the present case should have been limited to a reasonable degree of ballistic certainty.

The Massachusetts courts are not alone in limiting firearm identification testimony. In United States v. Ashburn, 88 F. Supp. 3d 239, 248 (E.D.N.Y. 2015), the United States District Court for Eastern District of New York wrote:

> Based on the court's review of the field of toolmark and firearms identification, including the NAS Report upon which Laurent relies, and on this court's review of *Daubert* proceedings performed in other cases, an instruction limiting LaCova's testimony is appropriate. See, e.g., Willock, 696 F.Supp.2d at 549 (precluding expert from stating opinions and conclusions with any degree of certainty and precluding expert from stating that it was a "practical impossibility" that any other firearm fired the cartridges in question); Taylor, 663 F.Supp.2d at 1179 (limiting expert to an opinion that his conclusion was "to a reasonable degree of ballistic certainty"); Glynn, 578 F.Supp.2d at 574 (limiting expert ballistics opinion to statement that match was "more likely than not"); Diaz, 2007 WL 485967, at *14 (precluding experts from testifying that their conclusions were "to the exclusion of all other firearms in the world" and limiting description of certainty to a "reasonable degree of certainty in the ballistics field"); Monteiro, 407 F.Supp.2d at 372 (limiting testimony to a "reasonable degree of ballistic certainty"); Green, 405 F.Supp.2d at 124 (precluding expert from testifying that his methodology permitted "the exclusion of all other guns").

The court in Ashburn cited Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under both Daubert and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), Agent Smith's testimony should have been limited to consistencies he observed. Petitioner

did not challenge the general methodology used to make the comparison. Instead, Petitioner challenged the witness's testimony that a particular firearm fired a particular shell casing as outside the scope of the witness's expertise. The request to limit the testimony and the citation to United States v. Green triggered the trial judge's duty as gatekeeper pursuant to Rule 702, SCRE, and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010), to conduct a hearing to allow the State to try and show that the testimony was within the scope of the witness's expertise. While the expert was qualified to testify, without objection, generally about forensic firearms examination and consistencies observed, the State failed to prove that his testimony that a particular firearm fired a particular casing was within the scope of his expertise. The trial judge abused his discretion in allowing the testimony without a hearing. The error is not harmless.

In affirming the conviction this Court wrote:

> With no challenge to the expert's qualification or methodology, there was no reason to limit the expert's testimony to "consistencies" between the fired shell cartridge found at the crime scene and the test-fired shell cartridges from Ginther's gun. See State v. Hackett, 215 S.C. 434, 445, 55 S.E.2d 696, 701 (1949) (explaining that courts "allow the introduction of expert testimony to show that the bullet which killed the deceased was fired from a particular pistol or rifle ... [if] the witness ... is, by experience and training, qualified to give an expert opinion in the field of ballistics.").[1]

State v. Ginther, No. 2019-000672, 2024 WL 470821, at *1 (S.C. Ct. App. Feb. 7, 2024). Petitioner respectfully submits that this Court overlooked the fact that the challenge was to the scope of the expert's testimony not to his qualification as an expert or to the general methodology used. The motion to limit the expert's testimony did not require an objection to qualification or general ballistic methodology. The motion did require a hearing with the State bearing the burden of proving that the proposed testimony – that a particular firearm fired a particular casing - was within the scope of the witness's testimony. Respectfully, reliance on State v. Hackett is

misplaced because, ". . . the sole question raised by this appeal is whether the evidence adduced at the trial meets the requirements of law as to the sufficiency of circumstantial evidence necessary for conviction." Hackett 215 S.C. at 436, 55 S.E.2d at 697. The Hackett case, decided in 1949, was a directed verdict case and did not involve a challenge to the scope of the expert's testimony as in this case. Additionally, the persuasive authority from other jurisdictions cited above supports that the science of forensic firearms examination has developed significantly since 1949.

In a footnote this Court wrote:

> To the extent Ginther argues the trial court erred by failing to conduct a hearing on the reliability of the methodology used by the expert pursuant to Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), and by failing to limit the expert's testimony to "a reasonable degree of ballistic certainty," we hold these issues are not preserved for appellate review. See State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007) ("To properly preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court[.]"); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector.").

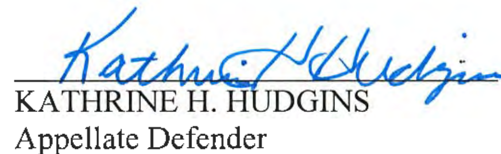
State v. Ginther, No. 2019-000672, 2024 WL 470821, at *1 (S.C. Ct. App. Feb. 7, 2024).

Petitioner respectfully submits that this Court overlooked the fact that once the motion to limit the expert witness's testimony was made, the judge was required to hold a hearing to allow the State, as the proponent of the expert testimony, to try to prove that the witness's testimony that a particular firearm fired a particular fired cartridge case was within the scope of the witness's expertise. The trial judge abandoned his duty as gatekeeper pursuant to Rule 702, SCRE, and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010), when he failed to conduct a hearing and require the State to show that the testimony was within the scope of the witness's expertise. Respectfully, the trial judge's failure to conduct a hearing is preserved for appellate review.

Additionally, the "reasonable degree of ballistic certainty" is simply an example of how the witness's testimony could have been limited to within the scope of his unchallenged expertise as opposed to testifying that a particular firearm fired a particular casing. Again, the challenge was to the scope of the expert's testimony. The trial judge erred in allowing the expert to testify without requiring the State to prove that the testimony was within the scope of his expertise.

The trial judge erred in refusing to limit the opinion testimony of the expert witness in forensic firearms examination to consistencies in the comparison of the firearm and the shell casing without conducting a hearing and requiring the State to show that the testimony was within the scope of his expertise. The error was not harmless. Petitioner respectfully requests rehearing.

Respectfully Submitted,



KATHRINE H. HUDGINS
Appellate Defender

This 21st day of February, 2024.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

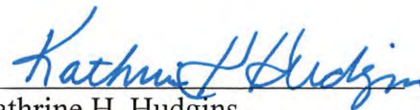
JAMES L. GINTHER,

PETITIONER

APPELLATE CASE NO. 2019-000672

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and James Lee Ginther, #379791, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 21st day of February, 2024.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES L. GINTHER,

PETITIONER.

Appellate Case No. 2019-000672

RETURN TO PETITION FOR REHEARING

STATEMENT OF THE CASE

On November 16, 2017, James L. Ginther ("Ginther"), kidnapped and then murdered victim Suzette Ginther ("Suzie"), his ex-wife, in Sumter County. On November 18, 2017, an arrest warrant for murder was obtained. On November 20, 2017, Ginther was arrested in Kentucky and returned to South Carolina. He was then indicted for murder and kidnapping. (2018-GS-43-0206). On April 8, 2019, Ginther proceeded to a jury trial before Circuit Judge R. Ferrell Cothran. At the conclusion of the trial, the jury found Ginther guilty as charged. He was sentenced to life for murder and no sentence for kidnapping. Ginther appealed to this Court raising the following issue: (1) the admissibility of a firearms expert's testimony matching a shell casing to a particular weapon. On February 7, 2024, this Court affirmed in an Unpublished Opinion State v. Ginther, 2024-UP-046 (Ct. App. 2024). The *relevant portion* of the Opinion was as follows:

PER CURIAM: James L. Ginther appeals his convictions for murder and kidnapping, and sentence of life imprisonment without parole. On appeal, he argues (1) the trial court erred in refusing to limit a forensic firearms examination expert's opinion testimony to "consistencies" between test-fired shell cartridges from Ginther's gun and a fired shell cartridge found at the crime scene,[.] …….We affirm pursuant to Rule 220(b), SCACR.
1. We hold the trial court did not abuse its discretion in admitting opinion testimony from a witness qualified as an expert in forensic firearms examination that Ginther's gun fired a shell cartridge found at the crime scene. See *State v. Wallace*, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023) ("We review a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of Evidence—under an abuse of discretion standard."); *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018) ("A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law."). Ginther did not object to the expert's qualification or the reliability of the methodology used to form the expert's opinion. See Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *Wallace*, 440 S.C. at 544, 892 S.E.2d at 313 ("To admit expert testimony under Rule 702, the proponent—in this case the State—must demonstrate, and the trial court must find, the existence of three elements: 'the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.'" (quoting *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999))). With no challenge to the expert's qualification or methodology, there was no reason to limit the expert's testimony to "consistencies" between the fired shell cartridge found at the crime scene and the test-fired shell cartridges from Ginther's gun. See *State v. Hackett*, 215 S.C. 434, 445, 55 S.E.2d 696, 701 (1949) (explaining that courts "allow the introduction of expert testimony to show that the bullet which killed the deceased was fired from a particular pistol or rifle . . . [if] the witness . . . is, by experience and training, qualified to give an expert opinion in the field of ballistics.").[1]

[Discussion of Appellate Issue 2 Omitted from Opinion]

AFFIRMED.[2]

WILLIAMS, C.J., and HEWITT and VERDIN, JJ., concur.

1 To the extent Ginther argues the trial court erred by failing to conduct a hearing on the reliability of the methodology used by the expert pursuant to *Watson v. Ford*

> *Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), and by failing to limit the expert's testimony to "a reasonable degree of ballistic certainty," we hold these issues are not preserved for appellate review. See *State v. Sweet*, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007) ("To properly preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court[.]"); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector.").
>
> 2 We decide this case without oral argument pursuant to Rule 215, SCACR.

Ginther, *supra*. Ginther then filed a Petition for Rehearing but only on Appellate Issue One. Ginther *alleges* the Court misapprehended the law as to Issue I. and his allegation the trial court erred in not granting a Watson hearing was preserved for appellate review. Ginther is wrong on both counts, and this Court should deny the Petition for Rehearing. As this Court correctly set forth in its Opinion above, Ginther stipulated to the qualifications of the State's firearms expert witness **and** did not challenge the methodology employed by the expert to make the match between the shell casing found at the crime scene and Ginther's gun recovered on his person. What Ginther stipulated to and did not challenge is the very purpose of a Watson hearing. Further, Ginther did not request a Watson hearing below, but only stated he *might need one*, but after the State agreed to not attempt to introduce the report with the language to the exclusion of all other weapons, and the Court informed Ginther he was going to admit the testimony, Ginther acquiesced to the trial court's ruling and merely objected when the expert testified before the jury. Further, as set forth in Respondent's brief, the cases to which Ginther cites are outdated minority opinions and are not controlling in South Carolina, and the more recent authority and majority opinion holds such testimony of the firearms expert is admissible. Finally, what Ginther wanted the expert to testify to was equally damning and there was other overwhelming evidence of Ginther's guilt, so there could be no prejudice to Ginther and any error would be harmless.

FACTS

Ginther and Suzie were divorced and had 2 children together. Before the divorce, they lived in a home owned by Suzie's father in Cherryvale, in Sumter County. Before the divorce was final, Ginther was forced to move out and into a mobile home nearby. Suzie and the children stayed in her father's home. Ginther had no car, but Suzie would allow him to use her van. It had a broken sliding door that would not lock. Suzie never locked the doors anyway. Ginther would walk from his home to Suzie's home, drive the van to his job as a security guard, return the van after work, and walk back to his trailer. Around March of 2017, Suzie's boyfriend William Parker ("Parker") moved in with Suzie and the kids. Ginther was still residing in the trailer. (R. 61-106; 224-38).

Ginther met Rachael Salak ("Rachael") on-line. She became his fiancé. She moved in with Ginther but did not like the area. They moved first to Virginia, then to California and moved in with Rachael's parents, and then to a home off Beltline Blvd. in Columbia, about a block from where Suzie worked, *Pet Smart*. (R. 61-106; 224-38; 327-59; Stip. of Rec. 4).

Suzie had custody of the 2 children, and at the time of her death, she still lived with Parker in the home in Cherryvale. Ginther had weekend visitation and had to pay child support. Ginther and Suzie did not get along; there were arguments. Ginther was also angry at Suzie about an "app." he found on 1 child's phone. Because of her fear of Ginther, Suzie would have someone with her when she exchanged custody with him. (R. 61-106; 224-38; 327-59; 572; Stip. of Rec. R. Salak).

At the time of Suzie's death, Ginther was still residing in Columbia, with Rachael and their newborn infant son in the same rental home just off Beltline Blvd. near Suzie's work. (R. 305, ll. 6-12). Rachael had a caesarean section and difficult recovery. Ginther quit his job to stay home and help Rachel with the baby. Ginther was attempting to make money with a photography business he recently started. Ginther and Rachael also depended on support from Rachael's parents

who gave them money to purchase a new car, a *Nissan Cube.* During this time, Ginther talked with Rachael about trying to get custody of his 2 children by Suzie. Ginther would also drive from his home to Sumter County, park near Suzie's home, and walk to her home to see if their children were properly supervised. (R. 327-59; Stip. of Rec. Rachael Salak; 305, ll. 6-12).

On early Thursday morning, **November 16, 2017**, Suzie was supposed to be at work at *Pet Smart* in Columbia at 5:00 a.m. to open the store. She did not appear. Her routine was to drive from her home to work, a trip of about 45 minutes. Almost immediately a co-worker *and* a manager tried to phone her, but with no response. One phone call to Suzie at 5:15 a.m. was routed to voice mail *by someone* pushing a button on her cell phone. After that, there were no outgoing calls on her phone, only incoming calls going to voice mail. (R. 122-52; 463-79; 555).

Suzie was kidnapped from the driveway of her home *or* as she drove to work shortly after 4:00 a.m. She was then murdered. Parker testified Suzie left for work on *the 16th*, at 4:00 AM. while it was dark. She kissed Parker goodbye before leaving and told him not to get out of bed. She left in her van. Parker never saw Suzie alive again. Parker testified the sliding door on the van was broken when he met Suzie; it would not lock; and, it was Suzie's habit not to lock the van at night. The van was still registered in Ginther's name even though Suzie got the van in the divorce. Ginther was familiar with the van Suzie drove to work the morning she disappeared because he had driven it numerous times before. However, Ginther did not know the van was still registered in his name. (R. 61-124; 113; 133-52; 224-38; 327-59; Stip. of Rec. R. Salak; 555-60).

The van Suzie drove was found empty and abandoned on Harwood Dr., a rural paved road in Cherryvale, at 7:01 a.m. by a deputy sheriff on patrol. It was parked in the road around a sharp curve where there were only woods on both sides and was covered in sandy dust especially in the wheel well and on the back bumper. The roads from Suzie's home to the location of the van were

all paved. The van was found in a direction Suzie would not take to work. Her habit was to leave her home, turn right on to Cherryvale Rd. leading to Highway 378, and turn left on Hwy. 378 and drive straight to Columbia to *Pet Smart*. (R. 105-24; 61-106; 670-71; 224-38; 555, 560).

After trying to phone her, Suzie's co-worker and a manager began checking hospitals, first responders, jails, and fire departments to determine what happened because Suzie was one of the most dependable people her manager had ever known. Her fellow employees eventually contacted Suzie's family, and the police were contacted. A formal BOLO for Suzie was issued at 2:00 p.m. (R. 133-52; 61-106; 224-38; 560; 570).

The deputy who found the van at 7:01 a.m. was not aware Suzie was missing at that early hour but determined the van was registered to Ginther. A Columbia policeman was sent to Ginther's home which was videotaped. At first, no one would answer the door. As the officer was leaving, Rachael opened the door. Ginther was in the shower. Rachael and Ginther were then informed his van had been found abandoned in Sumter County. By phone, Ginther eventually told the deputy who found the van that it belonged to his ex-wife, and he was not aware it was still registered to him. In another call, Ginther told the deputy if something was wrong, he would come pick up their 2 children. The deputy spoke with Ginther 3 times by phone between 7:01 a.m. and 12:00 noon. When Suzie was entered as a missing person, the police went back to the van and seized it. Suzie was not in the van when it was found it at 7:01 a.m. or when seized later in the morning. There was no blood in the van either. (R. 107-24; State's 61).

When Parker found out Suzie was missing, he drove her route to work and back thinking she may have been in an accident. When he found out the van had been located, he drove to where it was parked, looked in the van, and noticed Suzie could not have driven it to where it was found because the seat was pulled back too far. When she drove the van, the seat was pulled almost all

the way up so her feet could reach the accelerator and brakes, and Parker could not get in the driver's seat after she drove it. Parker noticed there was dust all over the van, and sand in the seats. The van also looked as if someone had rifled through it, but no money was missing. A radio headset with wires was broken and hanging over the driver's headrest. Parker searched nearby woods but could not locate her. He and Suzie's brother went door to door trying to locate Suzie. (R. 61-106).

The same day, around ***4:30 to 5:00* p.m**., Suzie's body was found by a deer hunter in some woods in the Wedgefield area of Sumter County. (R. 268-69; 148, ll. 18-23). Her fully clothed body, wearing her *Pet Smart* uniform, was buried in a shallow dug grave behind a pond in a swampy area off Burnt Gin Rd. The road to where her body was located was a sandy dirt road, which if you drove, would cover your car in dust. The previous day, the same hunter saw an empty hole in the ground, in the same area where Suzie's body was found, containing standing water. On the next day, when the hunter discovered the body, 1 of Suzie's feet was sticking slightly out of the grave. The remainder of her body was covered with dirt, leaves, and branches. Broken limbs nearby were consistent with those covering the grave and the body. After discovering the body on *the 16th*, the deer hunter ran to his truck and called 911. (R. 247-284; 167-196; 287-302; 381-391).

Police responded. The hunter pointed to the area where he saw the foot sticking out of the ground. Found near Suzie's body was a fired 9mm Winchester shell casing. There was also blood on the ground near the grave. Also found in a dirt parking area nearby was 1 work glove, marks on the ground indicating a possible struggle, and a packaged lady's tampon matching other packed tampons found in Suzie's clothing at autopsy. The autopsy determined Suzie died from a single gunshot wound to the back of the head. She had a bruise on the top of her thigh near the buttocks. She was not sexually assaulted. She breathed several times after being shot before expiring and had mud and muddy water in her mouth and lungs, and blood in her throat and mouth indicating

she was shot at the scene where she was found and expired in the shallow muddy grave. She also was experiencing her monthly menstrual period or possibly breakthrough bleeding of her uterus at the time she was murdered, consistent with the packaged tampons found on the ground in the parking area and in her clothing at autopsy. (R. 247-284; 167-196; 287-307; 359-80; 381-391).

Ginther's home in Columbia was a 45 minute to 1 hour drive from where Suzie's body was found. The easiest and most direct path from Ginther's home to Cherryvale was for Ginther to drive Hwy. 378 from Columbia to Sumter County. The trailer where Ginther had lived was about 1 mile from where Suzie's van was found the morning of her disappearance. Ginther was familiar with the area around Suzie's home and where the van was abandoned. Parker testified Suzie would never have driven her van there. It was a high crime neighborhood. Suzie did not go to that area of town. (R. 61-106; 224-38; 327-59; Stip. of Rec. R. Salak; 287-306; 555; 572-73).

On Saturday, November 18, 2017, Investigators Stewart and Hilliard, of the Sheriff's Office and SLED Agent Gainey met with Ginther at his home in Columbia. (R. 27; Stip. of Rec.). The meeting was recorded on a body cam. (State's Ex. #62 ; R. 302-03). Rachael was present for most of it but at one point she and Gainey stepped outside. Ginther told the investigators he owned firearms, including a Glock, 9mm and showed them the guns. The 9mm was on Ginther's person while interviewed. Ginther would not give police a DNA swab and refused to let them take his firearms including the 9mm. The investigators left. (R. 287-306; Stip. of Rec.; R. 314-25; State's # 62). After they left, Rachael questioned Ginther why he would not give a DNA sample. Only then did Ginther agree to provide a sample. (R. 314-15). Police were called back to the home and obtained a buccal swab from Ginther. Ginther still would not allow police to take his 9mm pistol.[1]

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[1] Warren Dundero lived across the street from where the van was found abandoned and testified the van appeared on Harwood Dr., between 7:00 a.m. and 10:00 a.m., November 16th. (R. 314-26).

Rachael testified Ginther was upset the van was still registered in his name. This directed police to Ginther the morning Suzie disappeared. Rachael testified Ginther initially "freaked out" when he learned Suzie's body had been discovered. It was through shear happenstance Suzie's body was discovered so quickly. Not only was it buried behind a dam 219 feet off the Burnt Gin Rd., but dirt, leaves, and branches had also been placed on top of the grave. Rachael was very emotional after learning of Suzie's death, but Ginther seemed almost happy after that. Rachael went to a neighbor for comfort because Ginther was not in the state of mind to provide such. She testified Ginther was agitated Saturday night after investigators left their home and believed police were going to charge him with the murder. (Stip of Rec., R. Salek p. 5, R. 327-59; 247-84).

Rachael could not sleep Saturday night. She confronted Ginther the next day, Sunday, asking him if he "did it," i.e. killed Suzie. Ginther suggested Rachael tell police she murdered Suzie because police would be easy on her because she was a woman with bipolar disease. As a result of this conversation, Rachael became afraid of Ginther and told him to leave their home. (Stip of Rec. of R. Salek p. 5, R. 327-59; 247-284).

Rachael testified the night of the murder, November 15th/16th, Ginther did not sleep with her in their upstairs bedroom. She got up during the night, and he was not in the other upstairs bedroom. The morning of Suzie's disappearance and murder, November 16th, Rachael awakened about 6:00 a.m. and Ginther was not upstairs in their home where she was. As she started down the stairs, she heard a noise and saw Ginther coming from the back door area of her home as if he had just come in the back door. Rachael was almost certain she heard the back door, which makes a distinct noise, before she saw Ginther come through the kitchen area. Ginther then took off his clothes and threw them in the washing machine. Ginther told Rachael he had had a confrontation with Suzie. Based on what he said and how he said it, Rachael believed the confrontation was *in*

person. Ginther showered. Rachael testified Ginther cleaned his 9mm handgun on Thursday or Friday because she asked him to do so outside because the chemicals bothered her and the baby. Later, when Ginther tried to get Rachael to take the blame for the murder, in discussing scenarios she could tell police, Ginther told Rachel that he could tell her the details and how he killed Suzie, but Rachael told him she did not want to know. Ginther told Rachael he killed Suzie for Rachael, the baby, and his 2 children by Suzie. (Stip. of Rec. of R. Salek; R. 327-59).

After Rachael became afraid and asked him to leave, Ginther packed up his survival gear and left the home in the *Nissan Cube*. He took his 9mm pistol with him but left his other guns. He visited Suzie's 2 children at their school on Friday, November 19th, and then fled to the state on Sunday. Before fleeing, Ginther had been told by Inv. Stewart, he knew how Suzie had been killed, where, and why. After Ginther fled, Rachael called investigators on Sunday and told them what she knew about Suzie's murder. Based on the recorded interview with Rachael, Stewart obtained an arrest warrant for Ginther for murder and entered his name, the make and model of his car, and his 9mm's serial number into NCIC. (R. 327-59; 396-404; Stip. of Rec. R. Salek & Agent Gainey).

Ginther was taken into custody on Monday in Louisville, Kentucky after he fell asleep on the interstate and the *Nissan Cube* wrecked and was immobilized. Ginther falsely told police his name was "Zach" and denied he had a gun on him. He tried to get the officers to let him walk to the next exit allegedly to meet a friend or relative. Officers said no. He asked to go into nearby woods and retrieve a backpack. Officers said no. After the *Cube's* registration was checked, it was discovered the murder warrant was outstanding, and Ginther was arrested and placed in the back of a patrol car. When Ginther was seen fidgeting, he was searched again, and it was discovered he had a 9mm pistol under his shirt. About 20 yards into the woods, police found Ginther's backpack,

containing an atlas, notebook, survival gear and food. Ginther was returned to this state, along with his Glock 9mm he showed investigators the previous Saturday. (R. 517; 543; 396-404; 508-49).

As previously stated, a fired shell casing was found in the woods near Suzie's body (State's Ex. 72; R. 177–78). The fired shell casing was submitted to SLED's Forensic Services Laboratory. (R. 411-13). The 9mm Luger Glock firearm found when officers arrested Ginther in Kentucky was also submitted. (R. 412, ll. 5-8). Chad Smith was offered as an expert in the field of forensic firearms examination without objection and he had been so qualified 50 times. (R. p. 421). Smith, testified, based on his microscopic comparison, in his expert opinion, the shell casing found at the crime scene was fired by Ginther's 9mm pistol. (R. 422; 433). Smith could not make an identification of any fired bullet components recovered from Suzie's skull at autopsy; they were too damaged or did not contain sufficient markings on them. (R. 406-35).

After his arrest, police searched Ginther's home finding numerous rounds of 9mm ammo and 2 live rounds exactly like the fired casing found at Suzie's grave. This live ammo was stamped W.I.N. on the bottom just like the casing found at the grave. Also found in his home was a Taser. (R. 548-55). Rachel confirmed a shovel was missing from Ginther's home. (Stip. of R. Salek; R. 327-59). The work glove found in the parking area near Suzie's body was sent to S.L.E.D.'s DNA lab. The interior of the glove contained Ginther's DNA. (R. 435-52). Police could never locate Ginther's phone or Suzie's cell or work phone. They were not in the abandoned van, at the crime scene, in Suzie's home, in Ginther' home, in *the Cube*, or on Ginther's person or in his backpack when arrested. Police did obtain phone records and cell-site location information (CSLI) on Ginther's and Suzie's personal phones which showed Ginther left his phone at his home during the time he drove to Sumter and killed Suzie, turning the phone off Wednesday night and not turning it back on until roughly 7:30 a.m., Thursday *the 16th*. However, police were able to

determine he and Suzie spoke the afternoon of the 15th and Suzie sent him a text that evening at 8:12 p.m. He did not answer the text until the next morning after he turned his phone back on. Inv. Stewart testified Ginther showed him his phone when interviewed on the 18th, and it showed activity between Ginther and Suzie on the evening of November 15th, and the night of the 15th. (R. 463-506; 557-62). The jury deliberated 1 hour and 2 minutes before convicting Ginther.

The Petition for Rehearing

In his Petition for Rehearing, Ginther only challenges this Court's findings as to Appellate Issue I. Appellate Issue I. dealt with the forensic firearms identification of the fired 9mm casing found next to Suzie's grave to Ginther's 9mm confiscated in Kentucky from Ginther's person. This Court correctly decided this issue and the Petition for Rehearing must be denied.

What occurred below

Pre-trial, Ginther informed Judge Cothran he may have an objection to a portion of the S.L.E.D. ballistics report (R. 15, ll. 19-25), and later informed the court he may have an objection to some of the ballistics testimony and *might* need a hearing. (R. 125). Later in the trial, 2 witnesses prior to the State's firearm's and toolmark [ballistics] expert testifying, Ginther made the following objection outside the presence of the jury:

> Mr. Bridges: And then my other objection[2] will be with the report. The other report where Item one –where basically the forensic examiner tested the cartridge case. He claims that matching and individual identifying characteristics were found and it was concluded that Item One was fired by Item 19.
>
> My objection would be that – I've consulted with an expert, my own, Richard Earnest. Through my consultation with him and also through my - - now, this is not South Carolina precedent, but there is a case; United States v. Green Federal Case. That kind of language that that firearm fired that cartridge case to the exclusion of other firearms in the world I think - - I don't know if he can actually make that claim.

[2] The previous objection alluded to was a preliminary firearm's report not relevant here. (R. 392).

> I think that's beyond the scope of what he can say. He can say there are things that match up. There are things that are consistent, but I don't think he can say that conclusory language. If that report itself comes into evidence I will object to that at that point.
>
> THE COURT: Okay.
>
> MR. FINNEY: Your Honor I don't think I intend to put in his report, the written Report. But I do plan on asking him whether the cartridge found near the body was examined and compared to the gun taken from the Defendant. And my anticipation is he's going to say it was examined microscopically and determined to be fired by that gun.
>
> THE COURT: Okay.
>
> MR. BRIDGES: That's when I would say my objection.
>
> THE COURT: I understand. Whatever he says you can cross-examine him on it. I mean based on what information you have. I mean I'm assuming the question is proper and you can object to the question or form of the question, but it's his opinion if he's qualified to give one you can obviously cross examine him on that. Whether it's accurate or not or whatever.
>
> MR. BRIDGES: Okay.
>
> THE COURT: Based on your information.
>
> MR. BRIDGES: Thank you, Your Honor. My main concern was just the report coming in as is, and if he doesn't introduce the report I think that will cut down.

(R. 392, ln. 22–394, ln. 12). [The remainder of the discussion is about chain of custody.]

Ginther offered no testimony from his expert and did not ask for an evidentiary hearing. There is no evidence in the record Ginther even provided the Court below with the citation or a copy of the case he cited for his objection.[3] (R. 392-96). He did not argue or request the State's expert should only be allowed to testify to a reasonable degree of scientific or ballistic certainty.

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[3] The only way Respondent knows what United States v. Green Ginther is referring to is by reference to Ginther's appellate brief. (IBOA, p. 9, citing United States v. Green, 405 F.Supp.2d 104, 124 (D.Mass. 2005).

He argued only the expert should not be allowed to testify the shell casing was a match to Ginther's gun to the exclusion of all other firearms or weapons. (R. 392-94).

After 2 witnesses testified, the firearms and toolmark expert Chad Smith testified. Ginther did not object to Smith's qualifications **or** the methodology that he used. (R. 411-22). Ginther only objected when Smith was asked about his ultimate conclusion or expert opinion:

> Q: All right. Did you come up with a conclusion as to whether that fired casing was fired by that Luger?
>
> A. Yes, sir. I did.
>
> Q. And what was your conclusion?
>
> A. I was able to conclude that ---
>
> MR. BRIDGES: Raise my previous objection.
>
> THE COURT: Okay. It's so noted. Go ahead.
>
> THE WITNESS: Yes, sir I was able to conclude that the fired cartridge case submitted as State's Exhibit 72 was fired by this particular firearm, State's Exhibit 68 [Defendant's gun].

(R. 422, ll. 4-13). While the expert testified it was his opinion or conclusion the fired shell casing found at the scene was fired by Ginther's gun, he did not testify his opinion was to the exclusion of all other firearms in the world. The State's expert could not match the fired bullet fragments and a bullet jacket recovered at autopsy to Ginther's gun because they were too damaged or did not contain sufficient markings. (R. 423-26). Thereafter, Ginther thoroughly cross-examined the expert. (R. 426-32). The expert admitted he had not tested every other 9mm firearm in the world and did not compare the casing to any other firearm. (R. 428-29). Ginther was not prohibited from cross-examining the expert about any information Ginther had from his consulting expert or the case opinion he mentioned to the Court. On re-direct, the Solicitor asked the expert to clarify his testimony as to the shell casing and Ginther renewed his previous objection. (R. 433). Which

Judge Cothran overruled. (R. 433). The expert confirmed it was his conclusion State's Ex. 72, the fired shell casing, was fired by Ginther's gun. (R. 433, ll. 17-19). Again, he did not testify his opinion was to the exclusion of all other guns in the world. He testified the fired bullet fragments from autopsy could have come out of the fired casing or another, but there was not enough information due to damage to say they came from Ginther's gun. (R. 433-34). The State did not introduce the expert's report containing the complained of language. (R. 411-33; 392-194).

At the completion of the State's case, Ginther did not testify or introduce any evidence. He did not introduce his own firearm and toolmark expert's counter-opinion. However, he was not prohibited from introducing any evidence he wished to impeach the State's expert's opinion on cross-examination or in his case in chief. (R. 574-78; 588). The trial court also gave a limiting instruction to the jury that it should consider expert testimony as any other witness. (R. 652-53).

Issues Raised on Appeal

On appeal, Ginther argued Judge Cothran should have prohibited the state's firearms and toolmark expert from testifying that based on his test firing Ginther's gun and microscopically comparing a fired shell casing from Ginther's gun with the fired shell casing found near the victim's body, that he concluded in his expert opinion the fired shell casing found at the crime scene was fired by Ginther's 9mm pistol seized in Kentucky on Ginther's person. Contrary to Ginther's assertions in his brief, at no time did the State's firearm expert testify that his opinion "was to the exclusion of all other firearms or weapons" in the world. (R. 392-94; 411-35).

Ginther raised an additional issue not raised below, the State's expert should have been required to state his expert opinion was to a reasonable degree of scientific certainty or a reasonable degree of ballistic certainty. (IBOA, p. 10). This issue was also not raised in the statement of issue on appeal. (IBOA, p. 1).

Ginther also argued in his brief another issue not raised below *and* not raised in his statement of issue on appeal. (See 392-94; IBOA, p. 11). Ginther argued that *while he did not specifically challenge the methodology used to make the comparison between the fired shell casing found next to victim's body and the test casing fired from Ginther's gun*, *or the expert's qualifications*, he believes the request to limit the testimony and citation to Green, triggered the court's duty as gatekeeper pursuant to Rule 702, SCRE and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699, S.E.2d 169, 174 (2010), to determine if the methodology was reliable. (IBOA, p. 11). The record shows Ginther did not request a Watson hearing below when he raised his objection or when the expert testified at trial. (R. 392-94; 422, 433). He did not challenge the qualifications of the expert witness . (R. 392-94; 411-35). And, he conceded in his brief he did not challenge the scientific methodology used to make the comparison by the expert. (BOA, p. 11).

Ginther now raises this argument again, in Petition for Rehearing, but as this Court correctly found in its Opinion in this case, this issue was not raised below and is not preserved for appellate review. Even if it was, it would have no merit where Ginther stipulated to the qualifications of the expert and did not and does not challenge the methodology the expert used to make the match. Further, the cases cited by Ginther are old outdated minority opinions that have since been criticized and are not binding in this State.

In summary, Ginther now argued Judge Cothran abused his discretion in refusing to limit the expert's testimony in multiple fashions and in not holding a reliability hearing. (IBOA, 7-11). He also argued the error was not harmless.

As will be shown, the issue raised below is moot, and the issues now raised are not preserved for appeal, were waived, or Ginther acquiesced to Judge Cothran's ruling. Again, Ginther did not request a Watson hearing and offered no evidence below in support of his

objection, just his statement that his consulting expert told him the State's expert could not state what he stated in his report and referenced a case without providing the citation or opinion to Judge Cothran. (R. 392-94). Further, Ginther acquiesced to the trial court's ruling stating he really only wanted to keep out the expert's report, and given the State was not offering the written report, his cross-examination and challenge to the expert would be reduced or limited. (R. 394). While he did renew his previous stated objection at the time the expert testified, he had already acquiesced to the trial court's ruling or waived the issue, and the State did not elicit from its' expert the particular language that he challenged earlier. (R. 422, 433).

As to the merits, Ginther is simply wrong, and he cannot prove prejudice on this record given the overwhelming evidence of guilt. In support of these new arguments, Ginther argued additional case authority he did not cite to Judge Cothran below. (IBOA, p. 11). However, as will be shown, he cited to *a minority* of jurisdictions and many of the cases he cites to *are outdated*, limited to their peculiar facts, or are *wrongly decided* as recognized by the most recent authority.

Lack of Preservation or Mooting of the Issue

The first objection raised on appeal, that the State's firearms expert's opinion that the shell casing found at the scene was fired by Ginther's gun to the exclusion of all other weapons, should have been limited, is moot because contrary to Ginther's argument in his brief, the State's expert never testified his opinion "was to the exclusion of all other firearms." (R. 374-76; 393-417). Further, the State did not introduce the expert's report with that challenged language or even attempt to introduce it. (R. 392-94; 411-35). The objection is therefore moot, and this appellate ground should be dismissed. *See* Green, 405 F.Supp**. at 106-121** (holding based on that particular firearms examiner's lack of qualifications, failure to apply national or police department standards in conducting his examination, failure to be proficiency tested, lack of error rate, failure to

document his findings so his examination could be reproduced, and other deficiencies, the court would only allow him to testify to his observation of consistencies in the submitted evidence and would not allow him to conclude that the match he found "by dint of the specific methodology" he used "permits the exclusion of all other guns.").

Ginther's new argument in his brief that Judge Cothran should not have allowed this expert's opinion the shell casing found at the crime scene was fired by Ginther's gun [without the above challenged language], was waived below and is not preserved for appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)(issue is not preserved for appeal because it was not raised below); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(issue conceded in the trial court cannot be argued on appeal).[4] The case Ginther cited in his objection to Judge Cothran below, Green, specifically dealt with a challenge to testimony *of a particular expert* using *a particular method* that shell casings came from a particular gun to the exclusion of every other firearm in the world. Green, 405 F.Supp.2d **at 107**, **108-09**, **121**. Because of the failures of that expert *in qualifications*, *methodology*, and *in providing an error rate*, the Court would only allow him to testify to consistencies he observed and not render a match to the exclusion of all other firearms in the world. Id.

Here as this Court correctly found in its Opinion, Ginther did not challenge the expert's qualifications or his methodology. As a result, there was no merit to this argument and Green simply did not apply.

The next issue raised under this ground, that the expert's opinion testimony should have been limited to a reasonable degree of scientific or ballistic certainty, as correctly found by this

[4] As will be discussed herein, case authority recognizes a difference between an expert opinion a fired component came from a particular weapon *and* a match to the exclusion of all other firearms.

Court, is not preserved for appeal. (R. 392-94). Ginther only argued below that the expert's testimony that the shell casing found at the crime scene came from Ginther's gun to the exclusion of all other firearms should not have been allowed and should have been limited to stating he found things consistent between the fired shell casing recovered at the crime scene and the test shell casing fired from Ginther's gun. (R. 392-94). He never argued below the expert's testimony should have been qualified "to a reasonable degree" of scientific *or* ballistic certainty. (R. 392-94). His new argument, raised for the first time on appeal, that the expert's testimony should have been limited to a reasonable degree of scientific or ballistic certainty is not preserved for appeal because it was not raised below. Wilder Corp., 330 S.C. 71, 497 S.E.2d 731; Powers, 331 S.C. 37, 501 S.E.2d 116.

Finally, Ginther's argument raised for the first time in the body of his brief that his objection below triggered the need for a Watson hearing is not preserved. First, this issue is not raised in the statement of issue on appeal or even alluded to. (IBOR, p. 1). Rule 208(b)(1)(B), SCACR, Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000)(Ordinarily, no point will be considered on appeal which is not set forth in the statement of issues on appeal); *but see* Eubank v. Eubank, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001)(issue may be considered when the statement of issue read in conjunction with argument adequately raised the issue). Second, Ginther stated his objection was to the ballistics report and the language to the exclusion of all other firearms. When it was conceded the report would not come in, he did not request a Watson hearing, ask to call witnesses, or ask to take testimony from the State's expert. (R. 392-94). In fact, earlier, Ginther had told the Court he had an objection to the ballistics report and may have an objection to some ballistics testimony and *might* need a hearing. (R. 15 & 125). Instead, when the time came to request a hearing, he stated the fact the State agreed not to enter the report with the offensive

language would limit his objection and shorten it, and then stated he would object when the witness testified to his expert opinion. (R. 392-94). When Judge Cothran ruled preliminarily he would allow the expert's opinion and Ginther could impeach the witness with the information provided by his consulting expert *and* the opinion in Green, Ginther did not object that Judge Cothran did not hold a Watson hearing or make findings pursuant to State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). He agreed to Judge Cothran's ruling. (R. 392-94). Ginther acquiesced to Judge Cothran's ruling. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000); TNS Mills Inc. v. South Carolina Department of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)(issue conceded in the trial court cannot be argued on appeal). Immediately, before the witness testified, Ginther did not ask for a Watson/Rule 702, SCRE hearing or object that one had not been held. (R. 392-94). And, when he objected during the testimony before the jury, he referred to his previous objection, and the expert did not use the language "to the exclusion of all other firearms." As a result, this issue is not preserved for appeal because it was not raised below or raised in the statement of issue on appeal. Wilder Corp. (issue not raised below is not preserved for appeal); Rule 208(b)(1)(B), SCACR, Calhoun, 339 S.C. 96, 529 S.E.2d 14 (Ordinarily, no point will be considered on appeal which is not set forth in the statement of issues on appeal).

Finally, as this Court found in its Opinion, there is no merit to this appeal and the issues that were preserved. Ginther, *supra*.

Standard of Review

The decision whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)(citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice."

State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)(citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013); Douglas, 369 S.C. at 429-30 632 S.E.2d at 848. "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003). There is no abuse of discretion by Judge Cothran as this Court correctly found. Ginther, *supra*.

ARGUMENT I.

Judge Cothran did not err in refusing to limit the firearm's expert's testimony as requested.

As previously set forth, this issue is moot because the State did not introduce the SLED report with the offensive language or have the expert testify his opinion was "to the exclusion of all other weapons or firearms." *See* Green, *supra*.

Ginther now argues in his Petition for Rehearing, as in his brief, that Judge Cothran should have prevented the firearms expert from testifying in his opinion the fired shell casing found near victim's body was fired by Ginther's 9mm pistol. There is no merit to this argument either.

Historically, a witness skilled in firearm and toolmark examination [commonly called ballistics or firearms identification] may testify that a particular bullet or shell casing came from a particular gun. *See* State v. Hackett, 215 S.C. 434, 444-47, 55 S.E.2d 696, 701-02 (1949); State v. Bullock, 235 S.C. 356, 378-79, 111 S.E.2d 657, 668 (1960)(proof that defendant's gun fired bullet that struck 2nd victim was admissible because it showed whoever fired that bullet also killed the deceased in the same shooting). This type of testimony has been regularly admitted in South Carolina for years. *See* Hackett; Bullock. In Hackett, our Supreme Court set forth that this type of expert testimony was reliable and explained the process by which the expert reaches his opinion:

Thereafter, on March 3, 1948, the sheriff, accompanied by a deputy, carried the pistol, the bullet and the two discharged shells to Washington, and turned these exhibits over to Mr. Zimmers, a technical ballistics expert with the Federal Bureau of Investigation. The examination was made by Mr. Zimmers on the same day. The sheriff and his deputy returned to Greenwood with these exhibits and they were put into a shoe box and placed in the vault in the office of the county treasurer of Greenwood County.

It is now common knowledge that by means of the science of ballistics, it may often be determined that a bullet was fired from a certain pistol, and it is the modern tendency of our courts to allow the introduction of expert testimony to show that the bullet which killed the deceased was fired from a particular pistol or rifle, where it is first definitely shown that the witness by whom such testimony is offered is, by experience and training, qualified to give an expert opinion in the field of ballistics. 22 C.J.S. Criminal Law, § 565, page 876; 26 Am.Jur., § 440, page 460. The weight of such testimony is for the determination of the jury.

Before giving his testimony concerning the comparison tests which he made, Mr. Zimmers, the technical ballistics expert, who had seven years experience in the firearms department of the Federal Bureau of Investigation, testified at length as to his qualifications and training. He stated that he had been a witness as a technical ballistics expert in about eighty cases, and he described in minute detail the tests upon which he predicated his unqualified opinion that the bullet which had been taken from the body of Mr. Hunt was fired from appellant's pistol. He explained that he had fired several test bullets from this pistol for the purpose of comparison. He testified in part as follows:

‘A. The first thing I did was to examine the bullet superficially to determine whether it could have been fired in this gun, and when I determined that was so, I then proceeded to test the bullet and cartridge cases and compared that with the bullet and cartridge cases submitted by Sheriff White and that was carried out on an instrument known in the Fire-Arms Identification Department as a comparison microscope. That instrument consists of two separate and distinct compound microscopes which are joined by a common eye piece. By having the two eye-pieces it is possible to view simultaneously two separate and distinct objects which are placed on the two separate stages of this compound microscope.’

‘In so doing it is possible to examine the pattern of the microscopic marks which appear on the bullets which are fired from a particular weapon. The pattern of the microscopic markings if they are duplicated on both, that is on a bullet which is removed from the person's body, and a bullet or bullets which are fired from the suspect's weapon, it is possible then to identify that particular weapon as having fired the bullet submitted for comparison, and such an examination as that was conducted in this case.’

> 'The examination is based on these microscopic markings found on the surface of the bullet by virtue of the marks imparted to the bullet as it passes thru the gun barrel. When a weapon is manufactured, the manufacturer will insert in the gun barrel a definite turn that is referred to as 'lands' and 'grooves'. The grooves are the portion which are cut into the gun barrel in a spiral motion so that any projectile fired thru the gun barrel will have imparted to its surface the spiral motion to give the true trajectory while the bullet is in flight. The tools used in making these lands and grooves will impart to the surface of the gun barrel certain imperfections as the tools used are pulled thru and along the gun barrel on the machining operation, which leaves small pits and lines on the inside of the gun barrel, and each of these will in turn impart to a bullet fired thru the barrel of the gun a pattern of scratches which are characteristic to that gun barrel and to no other gun barrel. In addition to such marks left by the tool used to manufacture the gun barrel there are other marks which can be imparted by virtue of dust, rust, corrosion or anything else which might get into the gun barrel because the user has not taken care of it. By virtue of the aggregate number of imperfections on the inside of a gun barrel, and the manner in which these imperfections get there, it is safe to conclude that there could be no two weapons which will impart to the surface of a bullet the same pattern of microscopic markings.'
>
> 'It has found by scientific tests that it is not possible for two weapons to exist that impart the same pattern of microscopic markings. It is similar in this respect to finger printing examination where it has not yet been found that any two persons have identical fingerprints. The same is true of weapons, each leaves its own identifying marks characteristic to that weapon alone and no other weapon can impart similar markings.'
>
> Mr. Zimmers gave detailed testimony as to the ejector and extractor markings of the weapon and the pattern imparted to the discharged shells, and fully explained to the jury by photographs magnified thirty times, the special and peculiar indentations made by the firing pin of appellant's pistol upon the cap in the cartridge case.

Hackett, 215 S.C. at 444–47, 55 S.E.2d at 701–02.

Even though this type of expert testimony has been readily admitted and found reliable, it came under challenge in other jurisdictions from criminal defense attorneys beginning around 2004-05, *see* Green, *supra*, and increased with the NAR reports in 2008 and[5] then the P-CAST

[5] The NAR reports are also referred to in case opinions as the NAS reports. For uniformity, Respondent will use "NAR" but reference which report by the year 2008 or 2009.

report issued in 2016.[6] These 3 reports criticized the science of firearm identification and stated further studies needed to be done before its validity could be accepted. However, after the early challenges and the issuance of these reports, these reports themselves came under criticism, flaws were found in these reports and those who issued them, and further blind studies recommended by the reports and case opinions were conducted verifying firearms identification was in fact valid.

As a result, recently, after the 2008/2009 NAR reports and the 2016 P-CAST report, the majority of courts have rejected the arguments raised in the early challenges, those raised after the reports were issued, and now raised here, including both state and federal courts. State v. Miller, 852 S.E.2d 704 (N.C. App. 2020), *appeal dismissed*, 856 S.E.2d 108 (N.C. 2021); State v. Griffin, 834 S.E.2d 435 (N.C. Ct. App. 2019); Ficklin v. Commonwealth, 2022 WL 3640906 (Ky. April 18, 2022)(*Unpublished*); Williams v. Commonwealth, 2020 WL 1488775 (Ky. Ct. App. 2020)(*Unpublished*)(citing Garrett v. Commonwealth, 534 S.W.3d 217 (Ky. 2017)); Missouri v. Mills, 623 S.W.3d 717 (Mo. Ct. App. 2021); People v. Rodriguez, 106 N.E.3d 436, 442-45, 447, 449-51 (Ill. 2018); State v. Boss, 577 S.W.3d 509, 518-19 (Mo. App. W.D. 2019). *See* Nebraska v. Wheeler, 956 S.W.2d 708 (Neb. 2021) State v. Lee, 217 So.3d 1266 (La. Ct. App. 4th Cir. 2017); State v. Goudeau, 372 P.3d 945 (Ariz. 2016); State v. Williams, 814 S.E.2d 925 (N.C. Ct. App. 2018)(*Unpublished*); United States v. Otero, 849 F.Supp.2d 425, 437-38 (D.N.J. 2012), *aff'd* 557 F.App'x 146 (3rd Cir. 2014). These courts allowed an expert to testify based on his expertise and

[6] Green only dealt with the admissibility of a particular expert's testimony he found a match "to the exclusion of all other guns." The court found based on that expert's lack of professional certification, failure to follow national standards or his own police departments standards in conducting his comparison, his lack of proficiency testing, and the lack of testability of the method being conducted at the time, but which could have been done, and lack of note taking, and other deficiencies, the expert would only be allowed to testify to the consistencies he noted in the compared evidence not visible to the jury. Id.; United States v. Harris, 502 F.Supp. 3d 28, n. 4 (D.D.C. 2020)(distinguishing Green); United States v. Perkins, 342 Fed. Appx. 403 (10th Cir. 2009) (explaining the holding in Green)(*Not selected for publication in Federal Reporter*)

training, and on his examination of test evidence against the evidence from the crime scene, a particular bullet or shell casing was a match to or came from a particular weapon. Id. (above); United States v. Casey, 928 F.Supp. 2d. 397 (D.P.R.2013)(2008 and 2009 NAR reports did not prevent firearms expert from giving his opinion or to the certainty of his opinion of a match).

In Miller, 852 S.E.2d 704 (N.C. App. 2020), *appeal dismissed*, 856 S.E.2d 108 (N.C. 2021), the Court rejected the very argument made here. Miller, like Ginther, cited to cases from other jurisdictions and the NAR and P-CAST reports to exclude the State's firearms expert's testimony shell casings from the defendant's gun matched those at the crime scene. The State's expert was questioned about the P-CAST report and testified she disagreed with elements of the report and that report should be viewed with caution as it was created by academics not firearms examiners. She then testified how she conducts her microscopic comparison and she had previously done so in 350 to 400 examinations. She testified her work was not rushed and peer reviewed with concurrence in her findings. The trial court admitted the evidence under Rule 702, N.C.R.E., in its discretion finding the expert's opinion was the product of reliable principles and methods which she applied in this case based on her testimony under extensive foundation and *voir dire* questioning. The trial court understood that some scholars have questioned the reliability of this sort of testimony, and the court weighed that against the expert's explanation of her principles and methods and her testimony about why she believed them to be reliable. The Court found the trial court's determination the expert's testimony satisfied Rule 702's three-pronged test, despite some evidence from Miller challenging the reliability of this type of expert testimony, was not arbitrary; it was a reasoned decision. Id. The dissent would not have allowed the expert to testify her error rate was zero, without testimony of the general error rate in her field. Id. Again,

the appeal to the Supreme Court was dismissed. Likewise, in Griffin, 834 S.E.2d 435 (N.C. App. 2019), the Court again affirmed the admission of the very type of evidence admitted here. Id.

Miller and Griffin followed a series of unpublished opinions from the North Carolina Court of Appeals affirming the admission of this exact type of testimony challenged here. State v. Williams, 814 S.E.2d 925 (N.C. App. 2018)(*Unpublished*); State v. McGraw, 779 S.E.2d 787 (N.C. Ct. App. 2015)(*Unpublished*). Williams was decided after Daubert v. Merrell Cow Pharmaceuticals, Inc., 509 U.S. 579 (1993) was recently adopted by the North Carolina Legislature and McGraw was decided under the standard prior to Daubert.[7] Like Miller, both Courts found expert testimony identifying a fired component to a particular weapon was admissible over challenges raised pursuant to the P-CAST and the NAR reports in Williams and the NAR 2008 report and other documents in McGraw. The experts did not have to testify to a reasonable degree of scientific or ballistics certainty, or that the evidence was only consistent. The trial court's instructions to the jury regarding expert testimony, cross-examination of the expert, and the availability of a defense expert were found sufficient to challenge the expert before the jury. McGraw; Williams; *See also* State v. Dinkins, 319 S.C. 415, 462 S.E.2d 59 (1995)(similar).

Ginther cited 2 cases from the District of Columbia, United States v. Tibbs, 2019 WL 4359486 (D.C. Super. Ct. Sept. 5, 2019) (*Trial order*) and Williams v. United States, 210 A.3 734 (D.C. 2019). However, recently, the Kentucky Court of Appeals refused to follow those decisions finding the expert testimony as admitted in this case had long been admissible under Kentucky law and was still admissible; and, recognized its state Supreme Court likewise held this testimony was

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[7] South Carolina has not adopted Daubert or Frye v. United States, 293 F.1013 (1923). *See* State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990); Rule 702, 703, 704, and 403, S.C.R.E. *See also* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

admissible after the 2009 NAR and 2016 P-CAST studies were issued. Williams v. Commonwealth, 2020 W.L. 1488775 (Ky. Ct. App. 2020)(*Unpublished*)(citing Garrett v. Commonwealth, 534 S.W.3d 217 (Ky. 2017). In Garrett, 517 S.W.3d at 222-23, the appellant argued a firearm and toolmark expert should not be allowed to testify a particular bullet came from a particular gun, relying on the NAR 2009 report. In a decision occurring after both the 2009 NAR and the 2016 P-CAST reports, the Kentucky Supreme Court held the testimony was admissible under Daubert criteria. Garrett, 517 S.W.3d at 22-23. As the Kentucky Court of Appeals held in Williams, *supra* (2020), and as the Kentucky Supreme Court held in Garrett, "the proper avenue for the defendant to address his concerns about the methodology and reliability of the expert witness's testimony was through cross-examination as well as testimony from his own expert witness." Id., citing Garrett, 534 S.W.3d at 223; *See also* Council, 335 S.C. at 21-22; 515 S.E.2d at 519 (same); Dinkins, 319 S.C. at 418; 462 S.E.2d at 69 (same). More recently, the Kentucky Supreme Court followed its decision in Garrett in Ficklin v. Commonwealth, 2022 WL 3640906 (April 18, 2022)(*Unpublished*). Ficklin raised the 2009 NAR and 2016 P-CAST reports in opposition to the firearms examiners' testimony 2 particular fired shell casings came from the same gun. The Court upheld the validity of the science of firearms identification, finding the trial court did not abuse his discretion in admitting the expert's testimony, and affirmed the admission of the testimony. Id. The Court held the fact that the expert did not testify consistent with the 2009 NAR report's recommendation that his opinion was within a reasonable degree of scientific certainty was not preserved for appeal. Id.

Similarly, Green, cited by Ginther, is not helpful to him for the reasons already noted. That court found based on that expert's lack of professional certification, failure to follow national standards or his own police departments standards in conducting his analysis, his lack of

proficiency testing, and the lack of testability of the method being conducted at the time, but which could have been done, and lack of documentation, and other deficiencies, the expert would only be allowed to testify to the consistencies he noted in the compared evidence not visible to the jury. Green is limited to its particular facts. Id.; Harris, 502 F.Supp. 3d 28, n. 4 (D.D.C. 2020) (distinguishing Green); Perkins, 342 Fed. Appx. 403 (10th Cir. 2009) (explaining Green).[8]

In Missouri v. Mills, 623 S.W.3d 717 (Mo. App. 2021), the Court was confronted with the same issue and objection raised here and another. Appellant first alleged he should have been allowed to cross-examine the State's firearms expert with the NAR and P-CAST reports, and second the trial court should have held a Daubert hearing and excluded the expert's testimony a shell casing found at the crime scene came from a particular gun. The Court held the appellant was not allowed to cross-examine the expert with the NAR or P-CAST reports because he offered no expert testimony as to those reports' reliability, simply the reports and other courts had accepted them, and the State's expert testified both the NAR and P-CAST reports were flawed and not reliable and not conducted by those in the appropriate field of expertise. Id., citing State v. Carter, 559 S.W.3d 92, 96 (Mo. App. W.D. 2018)(excluding NAR and P-CAST reports where no foundation was laid as to their reliability as learned treatises and State's expert testified they were not reliable). The Court also found the firearms expert's testimony was sufficiently reliable and was properly admitted. The expert could testify in his expert *opinion* the shell casing was a match to a particular gun, but the weight to be given to his testimony was for the jury after thorough

[8] Green also recognized the early challenges to firearms identification in 2004/2005 had already been rejected by numerous other courts because of the longstanding acceptance of ballistics reliability including by the United States Supreme Court. Id. citing United States v. Hicks, 389 F.2d 514, 526 (5th Cir. 2004); United States v. Foster, 300 F.Supp.2d 375, 377 n. 1 (D.Md. 2004); (*Unpublished*); United States v. Williams, 2004 WL 2980027 (S.D.N.Y 2004)(*Not reported in F.Supp. 2d*) & referencing United States v. Scheffer, 523 U.S. 303, 313 (1998) (other citations omitted).

cross-examination as had occurred in this case. Mills, 623 S.W.3d 730-32, *referencing* State v. Boss, 577 S.W.3d 509, 518-19 (Mo. App. W.D. 2019)(holding firearm and toolmark examination evidence was sufficiently reliable to be admitted over a challenge based on the 2009 NAR report, even if the results somewhat relied on "subjective analysis' and the examiner's expertise and experience, and the expert could testify to their conclusions regarding the same of a match; defendant could cross-examine expert or call his own expert; weight and credibility of the expert's testimony was for the jury).

Nebraska agreed. *See* Nebraska v. Wheeler, 956 S.W.2d 708 (Neb. 2021)(finding state's firearms expert was qualified in the face of the 2016 P-CAST report, and testimony 7 fired shell casings came from the same gun was not overly prejudicial where defendant dropped challenge to ballistics methodology on appeal as appellant did here below, and expert did not testify another gun could not have been fired at the scene only that 7 shell casings she examined came from the same gun). Louisiana reached the same result. State v. Lee, 217 So.3d 1266 (La. Ct. App. 2017). Relying in part on United States v. Otero, 849 849 F.Supp. 2d 425. 431-38 (D.N.J. 2012), *aff'd* 557 Fed. Appx. 146 (3rd Cir. 2014), which was released after the 2008 and 2009 NAR reports, the Court upheld the admissibility of the expert's opinion of a match, as did the Otero Court. Lee. Illinois also agreed after both the NAR reports and the P-CAST report. People v. Rodriguez, 106 N.E.3d 436, 442-45, 447, 449-51 (2018). The Court held the expert witness could testify to his opinion a particular piece of evidence came from a particular weapon, and the NAR report's concerns went to weight not its admissibility. Rodriguez, 106 N.E.3d at 442-45, 447, 449-51. And, the Court noted this was fully explored on cross-examination of the witness. Id. at 451.

Recently, even a California appellate court rejected Ginther's argument made here holding the firearms examiner could testify in her opinion a fired shell casing at the crime scene matched

a test casing fired from a gun found on the defendant and therefore, in her opinion, came from the defendant's gun. People v. Therman, 2021 W.L. 4859299 (Cal. App. 3rd District, October 19, 2021)(*Unpublished*)(following the analysis in People v. Azcona, 58 CalApp.5th 504 (Cal.App. 6th Dist., filed December 10, 2020, modified, January 11, 2021), but reaching a different result).[9] The Court in Therman noted the trial court admitted the evidence in part because **flaws have been discovered in the P-CAST report** since it was issued; it was not the only opinion on the subject, the Attorney General of the United States and the F.B.I. had rejected that report, and it had been refuted by the Association of Firearm and Toolmark Examiners (the AFTE).[10] The way for the defendant to address the testimony is through cross-examination of the State's expert and calling his own expert. United States v. Brown, 973 F.3d 667, 702-04, (7th Cir. 2020). Finally, the State of Washington also agrees. State v. DeJesus, 436 P.3d 834, 841-42 (Wash. Ct. App. 2019). There the Court admitted ballistics identification testimony over a challenge relying on the P-CAST report and noted a number of courts had also rejected similar challenges relying on the 2008 and 2009 NAR reports. Id. at 841-43 (citations omitted).

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[9] In Azcona, the court held the error below was to allow language such as "to the practical exclusion of all other guns" when the expert did not present evidence at the pre-trial hearing to support that conclusion except his statement he had done numerous studies trying to see what could happen by random chance. Id. 58 Cal.App. at 513-14. That court also reversed for an issue not raised here below or in this appeal. Id. at 514-15.

[10] Further "black box studies" have been conducted as the P-CAST report recommended, which demonstrated the science of firearm's identification was reliable and had a miniscule error rate, if any, and the P-CAST committee did not include any firearm and toolmark examiners or researchers in the field, thus raising the question whether the P-CAST report criticism would even constitute a lack of acceptance in the "relevant scientific community." United States v. Harris, 502 F.Supp.3d 34-38, 42-43 (D.D.C. 2020). Harris also recognized the 2008 and 2009 NAR studies were outdated due to intervening scientific studies and repeatedly rejected by courts as a proper basis to exclude firearm and toolmark identification testimony. Id. at 34-38. Harris was decided after Williams, cited by Ginther in his brief.

Since the NAR reports and the P-CAST report, several federal circuits have also upheld the admissibility of firearms identification testimony as admitted here without limitation. Brown, 973 F.3d at 702- 04 (7th Cir. 2020), cert. denied, 141 S.Ct. 1253 (2021); United States v. Gil, 680 Fed. Appx. 11 (2d Cir 2017)(*Unpublished Summary Order*); *see* United States v. Godinez, 7 F.4th 628, 633-36 (7th Cir. 2021)(upholding another district court's admission of firearms identification expert testimony). In Brown, the trial court admitted the same testimony as admitted in the present case over the concerns in the P-CAST report. At trial, several firearm and toolmark experts testified shell casings found at one crime scene were fired by the same gun that fired shell casings at another crime scene. Id. at 702-04. The Brown Court affirmed the trial court's admission of the evidence not giving great weight to the P-CAST report. The Court noted that after an extensive hearing below, the lower court found the methodology employed by the firearm and toolmark experts was almost uniformly accepted by federal courts; the method had been tested and subject to peer review; 3 different peer-reviewed journals addressed the AFTE method, several reliability studies had been conducted and the error rate was miniscule including sometimes better than algorithms developed by scientists; and, firearm and toolmark analysis was widely accepted beyond the judicial system. Id. The Court found the contentions or concerns from the P-CAST report could be raised on cross-examination and went to the weight of the evidence, not its admissibility. And, expert testimony is still testimony not irrefutable fact, and its ultimate persuasive power is for the jury to decide. Id. at 704.

Federal district courts have also weighed in on the admissibility of firearms identification since the P-CAST report. Courts in Arizona, California, New York, Oklahoma, and Virginia also found firearms identification expert testimony admissible. Merritt v. Arizona, 2021 WL 1541635, at *3 (D. Ariz April 2021)(*Slip Copy*); United States v. Romero-Lobato, 379 F.Supp.3d 111, 1114

(D.Nev. 2019)(admitting firearms identification testimony over objection based on 2009 NAR and 2016 P-CAST reports); United States v. Johnson, 2019 WL 1130258 at *1-2 (S.D.N.Y. Mar. 11, 2019)(*Not reported in F.Supp*)(admitting firearms identification testimony over objection which relied on 2008 and 2009 NAR reports and 2016 P-CAST report); United States v. Simmons, 2018 WL 658693 (E.D. Va. 2018)(*Not reported in F.Supp*.). Many courts have rejected the findings of the P-CAST report. *See* United States v. Chavez, 2021 WL 5882466, at *17-18 (N.D. Cal. Dec. 13, 2021)(*Slip Copy*)(admitting governments' agreed to limited firearms identification testimony over challenge based on NAR and P-CAST reports, noting the 2009 and 2016 committees were not members of the forensic ballistic community, and rejecting defendant's citation to authority of the minority view relied on by appellant here, including that the minority court expanded the definition of relevant scientific community, and even including that definition, the firearm identification methodology still has overwhelming acceptance in the U.S. and worldwide).

Ginther also argues for the first time on appeal that the ballistics expert's testimony the fired shell casing was fired by Ginther's gun should have been limited to a reasonable degree of ballistic or scientific certainty. Multiple courts that agree with this unpreserved argument or issue, do not limit the expert to testimony to that Ginther argued below, that the expert only found consistencies in the evidence comparison. *See* United States v. Johnson, 875 F.3d 1265 (9th Cir. 2017)(limiting opinion of a match only to a reasonable degree of ballistic certainty); United States v. Hunt, 464 F.Supp.3d 1262 (W.D. Okla 2020)(similar); United States v. Cerna, 2010 WL 3448528, n. 4 (N.D. Cal. 2010)(*Not reported in F.Supp.2d*); United States v Diaz, 2007 WL 485967 (N.D. Cal. 2007); United States v. Monteiro, 407 F.Supp.2d 351, 372 (D. Mass. 2006)(allowing expert to give opinion of a match to a reasonable degree of ballistic certainty, if

expert follows established standards for intellectual rigor in toolmark identification field);[11] United States v. McCluskey, 2013 WL 12335325, *10 (D.N.M. February 7, 2013)(*Not reported in F.Supp.*)("to a practical certainty" or "practical impossibility of different origin"); United States v. Harris, 502 F.Supp.3d 28 (D.C. 2020)(limiting testimony to DOJ guidelines of such expert testimony and when a match can be testified to); *See also* United States v. Glynn, 578 F.Supp.2d 567, 574-75 (S.D. N.Y. 2008)(allowing expert to testify it was "more likely than not" that bullets matched)(other citations omitted including some in Ginther's own brief). In addition to the failure to preserve the issue of whether the expert's testimony should be limited to a reasonable degree of scientific or ballistic certainty, this practice by several district courts has been criticized as limiting or re-structuring an expert's testimony which is clearly admissible under Rule 702. 70 Baylor L. Rev. 93, *The Admissibility of Firearms and Toolmarks Expert Testimony in the Shadow of PCAST*, Baylor Law Review (Winter 2022).

As recent case law has shown, Ginther's challenge here is without merit. Ginther admits he does not challenge the methodology of firearms identification or the expert's qualifications. (BOA). Instead, he argues that the expert should not be able to opine that a particular piece of evidence came from a particular weapon, even when that is the qualified expert's opinion based on the methodology Ginther does not challenge. Since, the 2008 and 2009 NAR reports and the 2016 P-CAST report, flaws have been discovered in the reports or studies, and further testing as recommended by P-CAST has been done confirming the reliability of firearms identification. *See* Therman, 2021 W.L. 4859299 (Cal. App. 3rd October 19, 2021); Harris, 502 F.Supp.3d 28 (Dist.

[11] Montiero is cited Ginther's brief, however, Montiero did not hold that the expert could only testify to consistencies in the compared evidence. Montiero initially excluded the expert's opinion because he did not document his findings which would insure reliability of the results and testability. If the government met those standards, the expert could testify to a match to a reasonable degree of certainty in the field of ballistics. Id.

of Col. 2020). As a result, as cited above, the great majority of courts have rejected the challenge raised by Ginther, admitting this expert opinion testimony, and allowing the defendant to cross-examine or impeach the expert with those reports and even call a counter expert witness. Miller, 852 S.E.2d 704; Griffin, 834 S.E.2d 435; Ficklin, 2022 WL 3640906; Williams, 2020 WL 148877; Garrett, 534 S.W.3d 217; Mills, 623 S.W.3d 717; Rodriguez, 106 N.E.3d at 442-51; Boss, 577 S.W.3d at 518-19; Wheeler, 956 S.W.2d 708; Lee, 217 So.3d 1266; Goudeau, 372 P.3d 945; Otero, 849 F.Supp.2d 425, 437-38, *aff'd* 557 F.App'x 146; Brown, 973 F.3d at 702-04; Casey, 928 F.Supp.2d 397. As Judge Cothran did not abuse his discretion, this ground is without merit.

Finally, Ginther argues that his *in limine* objection triggered Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169. Contrary to Ginther's Petition for Rehearing, this Court correctly found this issue was not preserved for appeal. Ginther, *supra*. As shown, the *in limine* objection was to the SLED Report coming in because of the language of a match to the exclusion of all other weapons or firearms, which the State agreed it would not introduce. When Ginther informed the court he would raise the same objection to the expert's testimony, Ginther acquiesced to the trial court's ruling that he could cross-examine the expert on what his consulting expert had told him and what was in the case opinion he referenced. And, when the expert testified, the State did not attempt to or introduce the offensive language. Ginther never requested Judge Cothran conduct a Watson hearing or make findings pursuant to State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) or State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); *See also* State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). As a result, this issue was waived and abandoned at the trial level.

Regardless, as shown above, this type of expert testimony has been found reliable by our Supreme Court and repeatedly admitted in our courts. *See* Hackett, 215 S.C. 434, 55 S.E.2d 696; *See also* Bullock, 235 S.C. at 378-79, 111 S.E.2d at 668. In fact, our Supreme Court explained the

methodology by which a firearms expert makes his determination in detail. Hackett, 215 S.C. at 444–47, 55 S.E.2d at 701–02. Judges are presumed to know the law, and Judge Cothran would have been aware of our case precedent admitting this type of expert testimony. The firearms expert testified to the same methodology before the jury. **(R. 411-435). Ginther does not challenge and did not challenge the expert's qualifications. (IBOA & R. 421).** Even if he did, it would have no merit. The expert had been qualified over 50 times. (R. 421). **Ginther did not challenge the methodology the expert used to reach his opinion. (IBOA p. 11).** Ginther does not contest the testimony was helpful to the jury. Even if he did, the challenge would hold no merit. Scheffer, 523 U.S. at 313 (recognizing helpfulness of this testimony to the jury); Hackett, *supra*. The evidence' probative value outweighs any prejudicial effect. Council, *supra*. It is unfair prejudice the Rules of Evidence prevent, not the true importance of the evidence and its natural resulting effect on the case. State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998). As a result, there was no error in admitting the expert's testimony. White, 382 S.C. at 270-71; 676 S.E.2d 686-87.

The expert conceded he had not tested every other 9mm firearm in the world and did not compare the casing to any other firearm. (R. 428-29). Judge Cothran also properly charged the jury it should consider expert testimony as any other witness and determine its credibility for themselves and give it whatever weight they determined appropriate. White, at 271, 676 S.E.2d at 687. This dispelled any aura of infallibility.

Additional Sustaining Ground/Lack of Prejudice

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511,518, 633 S.E.2d 152, 156 (2006). Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.

Bryant at 518, 633 S.E.2d at 156. To show prejudice in the admission of expert testimony, Ginther must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506, 509 (2015). Ginther cannot show prejudice under this standard for several reasons including the language he specifically objected to was not testified to. (R. 392-94; 422; 433). The State did not introduce the SLED report containing the language "to the exclusion of all other" firearms. (R. 392-94; 411-35). The expert did not testify to the offensive language either. (R. 411-35). And, he did not testify his opinion was "to the exclusion of all other weapons." (R. 392-94; 422; 433). Fields. Further, Ginther has not shown allowing the expert to give his opinion the fired shell casing was fired by a particular weapon, rather than the opinion was to a reasonable degree of scientific or ballistic certainty, or the markings on the shell casing were perfectly consistent with being fired from Ginther's 9mm pistol, influenced the verdict. The evidence of Ginther's guilt was overwhelming. Further, expert testimony using the language Ginther suggests would not change the result but confirm his guilt when combined with all of the evidence. Fields.

The evidence proved Suzie ended the marriage with Ginther. Ginther had to move out of the home in Sumter because it was owned by Suzie's father. Ginther initially lived nearby in a mobile home in a high crime area. He had no car, and had to use Suzie's van, but he had to walk to her home to borrow it and then walk home after he returned it. As a result, Ginther was familiar with the area near Suzie's home and with the van which had a door which would not lock. Also, Ginther was familiar with the areas where Suzie's van was found the morning she disappeared and the location where her body was discovered that afternoon. Because they had 2 children together and because Ginther had rented a home practically across the street from Suzie's employer, Ginther

also knew Suzie's routine, including what time she would have left for work and what time she would arrive there. (R. 61-106; 224-38; 303-05; 326-59; 572-73; Stip. of Rec. R. Salak).

There were prior difficulties and animosity between Ginther and Suzie establishing both a motive for the crime and malice against the victim. Ginther and Suzie argued over their children. Suzie was afraid of Ginther and would have someone with her when she exchanged custody with him. Ginther was upset about an "app" he found on 1 child's phone while in victim's custody. Ginther was planning to try to obtain custody of their 2 children. Ginther had to pay child support to Suzie and was having financial difficulties due to a new infant child with his fiancé. Ginther would park near Suzie's home and spy on the home to see if she was supervising the children. Ginther had rented a home almost directly across the street from Suzie's place of employment. There was a phone call between Ginther and Suzie the afternoon before her murder and a text message to Ginther from Suzie on the night before her murder. (R. 463-506; 61-106; 224-38; 326-59; 572-73; Stip. of Rec., R. Salak, para. 4; 305, ll. 6-12).

At 6:00 a.m. the morning of Suzie's murder, Rachael got up and Ginther was not upstairs in their home. As she descended the stairs, she saw Ginther coming from the back door area of her home, and she recalled hearing a noise at the back door. Ginther told her he had got into an altercation with Suzie, which Rachael understood to be a physical altercation, and Ginther took off his clothes and put them in the washing machine. Ginther then showered. When police visited Ginther's home around 7:10 a.m. and began to question him the same morning when Suzie's van was located, he became upset because the van was still in his name, leading police to question Ginther immediately. Ginther initially refused to give the police his DNA or his gun, which led Rachael to confront him why he would not assist in the investigation of his ex-wife's murder. Only then, did Ginther agree to give police a DNA sample, which was used to match to the glove found

in the parking area near where Suzie's body was found and in the same area there were marks on the ground indicating a possible struggle. (R. 326-59; 304-06; Stip. of Rec. R. Salek).

Suzie's body was discovered on Thursday evening. Rachael testified when Ginther learned Suzie's body had been located, he became extremely nervous or agitated. He then seemed happy, but Rachael was not. Ginther was not able to comfort Rachael because of his attitude about Suzie's death. (R. 268-69; 148; 326-59; Stip. of Rec., R. Salak).

At the crime scene where Suzie's body was discovered, a fired 9mm Winchester shell casing was discovered. Suzie had a gunshot wound to the back of the head. Blood was found on the ground, but not in Suzie's abandoned van. The autopsy indicated Suzie was shot next to her grave and expired in the grave. Suzie's was fully clothed and wearing her work uniform indicating she was kidnapped on her way to *Pet Smart*. While Suzie had a small bruise on her upper thigh near her buttocks, Suzie *had not been sexually assaulted* and there was *nothing missing from her van found abandoned 1 mile from her home or from her person* but her phone and work phone. The evidence indicated someone wanted Suzie dead and executed her in a secluded area, but the motive was not sexual assault or robbery. (R. 247-284; 167-196; 287-306; 359-80; 381-391).

Ginther admitted to police on Saturday he had a 9mm semi-automatic pistol that when fired would eject a shell casing just like that found at the crime scene. Ginther had the gun on his person while interviewed, but it was concealed. When investigators asked to see the gun, Ginther showed the gun to them but would not give them the gun for testing. Even after giving his DNA sample to police, he would not turn over his 9mm pistol. Ginther had been employed as a security guard including in the armored car industry. (R. 27; 287-06; 314-25; 406-35; State's Ex. 62; 247-84; 167-96; 359-91). Rachael testified the 9mm pistol was Ginther's favorite gun and he cleaned the

gun on Thursday or Friday afternoon after Suzie's murder, indicating he had recently used the gun. She asked Ginther to take the gun outside because of the smell. (R. 326-59; Stip. of Rec. R. Salak).

When police began to focus their investigation on Ginther, Ginther became extremely nervous and told Rachael he believed he was going to be charged with Suzie's murder. Because of all that had occurred and all she knew, Rachael could not sleep on Saturday night and confronted Ginther on Sunday morning. Ginther admitted he had killed Suzie. Ginther asked Rachael to tell investigators she committed the murder, so he would not be arrested or go to prison, telling her the police would go easy on her because she was bipolar. He told her if she wanted to know the details of the murder and how he killed Suzie, he would tell her. She declined. He told her he had killed Suzie for Rachael, the baby, and his 2 children with Suzie. She told him to leave their home. (R. 326-59; Stip. of Rec. R. Salak; R. 247-284).

On Saturday, the chief investigator had told Ginther he believed he knew who killed Suzie and why but would soon know for sure. The following day, Sunday, Ginther packed his belongings including survival gear and his 9mm pistol. At first, he talked about taking Suzie's 2 children with him, but Rachael convinced him not to. He told Rachael he would meet her in the farthest town west in Wyoming. Ginther then took her credit card, some cash, and the couple's only vehicle, *the Cube,* and fled the State. (R. 326-59; Stip. of Rec. R. Salak; R. 396-404).

After Ginther fled, Rachael called the police and told them what she knew about the murder. Police obtained an arrest warrant for Ginther and entered it into the NCIC database. Police also searched Ginther's home finding ammunition exactly like what was found next to Suzie's body, 9mm Winchester stamped at its base W.I.N. Police also found a Taser, which could have been used to immobilize the victim before her death. Ginther was also employed as a security guard and had military training. He could have subdued the victim through other means or simply

by use of the gun as a threat to her or others. Missing from Ginther's home was Ginther's shovel. (R. 396-404; 548-55; 326-59; 552-56; 570-73; Stip. of Rec. R. Salak & Agent Gainey).

Ginther fled through North Carolina, Virginia, and West Virginia, then headed west in the direction of Wyoming but wrecked in Kentucky after falling asleep. He gave police a false name and tried to leave the scene several times on foot, stating falsely he was going to meet a relative at a nearby exit. Police took him into custody and found his survival gear in a backpack 20 yards into the woods. He denied he had a gun on his person, but Ginther's loaded 9mm semi-automatic pistol was found in his waistband. Also found was an Atlas, a notebook, and receipts for non-perishable items. (R. 508-49; 30; 177-78; 394-404; 406-35).

The glove recovered in the parking area near where Suzie's body was discovered was lying next to a wrapped lady's tampon. Victim was having her period or breakthrough bleeding at the time of her death. More wrapped tampons were found in her coat at autopsy. The glove was sent to SLED for testing which revealed Ginther's DNA in the glove. The second glove was never found. It was not in the van, Ginther's home, his *Nissan Cube*, or on his person. Ginther got rid of it. Even though Ginther showed police his phone on Saturday November 18th, after that it could not be found nor could Suzie's phones, which meant Ginther had gotten rid of them. Police also obtained surveillance photos capturing a *Cube* like vehicle at 12:50 a.m. on November 16th, traveling from the direction of Ginther's home toward Sumter on Hwy. 378. This was the approximate time Ginther needed to leave his home and drive to Sumter County so he could park his car near Suzie's home, so he could hike to Suzie's home, climb in the unlocked van and kidnap and murder her. The jury deliberated about 1 hour before returning guilty verdicts. (R. 247-284; 167-196; 287-306; 359-391; 435-52; 463-506; 557-62; 61-106; 133-52).

The firearms expert testified Ginther's gun was a 9mm semi-automatic firearm that ejects shells when fired. While he could not match the fired bullet fragments or fired bullet jacket to Ginther's gun because of the damage, the fired bullet was consistent with a 9mm bullet and could have come from the fired shell casing found at the crime scene. He also testified the casing found at the crime scene was a fired 9mm semi-automatic shell casing stamped W.I.N. (R. 411-35). Even if the Court had limited the expert's testimony as Ginther suggests, to a reasonable degree of ballistic or scientific certainty, or limited his opinion to the markings on the casing found at the crime scene and the markings on the test fired casing from Ginther's gun were consistent, it would not change the result; therefore, whatever testimony Ginther objects to did not influence the verdict. Fields; Watson. Here the evidence of Ginther's guilt was overwhelming and the jury was instructed expert opinion testimony did not have to be accepted by them.

CONCLUSION

For the above stated reasons, the Petition for Rehearing must be denied.

Respectfully Submitted,

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By: s/*J. Anthony Mabry*
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ATTORNEYS FOR RESPONDENT

March 7, 2024

RECEIVED
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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES L. GINTHER,

PETITIONER.

Appellate Case No. 2019-000672

PROOF OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing, and Proof of Service has been forwarded to petitioner's counsel, Kathrine Hudgins, Esq., via email today, March 7, 2024 to KHudgins@sccid.sc.gov and to her assistant at cstock@sccid.sc.gov.

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

This 7th day of March, 2024.

s/ Donna D'Alessio
Donna D'Alessio,
Legal Assistant to J. Anthony Mabry,
Senior Assistant Attorney General

The South Carolina Court of Appeals

The State, Respondent,

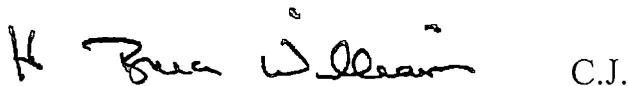
v.

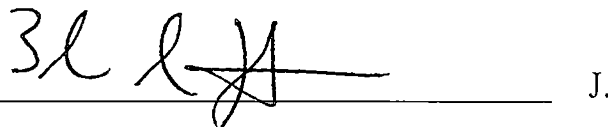
James L. Ginther, Appellant.

Appellate Case No. 2019-000672

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

J.

Columbia, South Carolina

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FILED
Mar 18 2024

Donald J. Zelenka, Esquire
The Honorable R. Ferrell Cothran, Jr.