STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

APPELLANT

APPELLATE CASE NO 2016-000108

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in admitting Appellant's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the Miranda warnings, Appellant thought he was required to speak with the police under the terms of his probation, and Appellant was high on marijuana and drunk?

II.

Whether the trial court erred in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because they results were of such weak statistical significance?

STATEMENT OF THE CASE

On September 25, 2014, the Jasper County Grand Jury indicted Appellant Billy Phillips for the murder of Darius Woods ("Decedent") and possession of weapon during the commission of a violent crime. R. * (Indictments).

On January 11-14, 2016, Phillips proceeded to trial before the Honorable Michael G. Nettles and a jury. Tr. 1. Phillips was represented by Steven Plexico, and the state was represented by assistant solicitors Mary Jones and Lenore Masser. Tr. 1.

The jury returned a verdict of guilty. Tr. 689 – 690. Judge Nettles sentenced Phillips to current terms of forty years for murder and five years for the weapons offense. Tr. 696.

This appeal follows.

STATEMENT OF FACTS

Introduction

Appellant Phillips and Decedent were friends. Tr. 153, ll. 8-10. Woods was known to sell marijuana from his home in Ridgeland, South Carolina, and carry large amounts of cash. Tr. 173, ll. 2-7; Tr. 173, ll. 20-24; Tr. 313, ll. 1-2; Tr. 359, ll. 8-25; Tr. 368, l. 2 – 369, l. 13; Tr. 374, ll. 14-15. On May 18, 2013, Decedent was shot twice with his own gun, a .38 special handgun, and died. Tr. 228, l. 22 – 230, l. 9; Tr. 574, l. 8 – 575, l. 4; Tr. 590, ll. 18-25. Phillips was picked up by an officer before 2:30 a.m. on May 19, 2013 and taken to the Ridgeland Police Department for questioning. Tr. 104, l. 25 – 106, l. 14; Tr. 405, ll. 12-23. Defense counsel challenged the admissibility of Phillip's first statement. Tr. 16 – 22; Tr. 52 – 60; Tr. 98 – 134. Phillips testified during the pre-trial suppression hearing that he was high, drunk, and thought that he was required to answer the investigators' questions because he was on probation. Tr. 123, l. 18 – 126, l. 24; Tr. 129, l. 22 – 130, l. 6.

Despite their repeated accusations, Phillips told the officers that he did not have anything to do with Woods' death and that he left him alive at approximately 9:30 p.m. He said that he was smoking marijuana in the Decedent's car while Decedent worked on fixing his tag light. Decedent had to pick up his roommate, Michelle, because she had some car trouble before and was then headed to a party in the Bluffton area at 10:00 p.m. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).[1] Following the Denno[2] hearing, the trial judge ruled that the statements were admissible, finding that Phillips was free to leave and made a knowing waiver of his

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[1] State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation) is on file with this Court.

[2] Jackson v. Denno, 378 U.S. 368 (1964).

Miranda[3] rights, though any references to probation, parole, or polygraphs should be redacted. Tr. 130, l. 14 – 134, l. 17.

Approximately one week later, on May 24, 2013, Phillips spoke with officers again. He told them he was in the car smoking marijuana outside of Woods' house on the night that Woods was killed. He saw three men approach the house. One went inside and he heard a gunshot. The men noticed Phillips in the car as they were leaving and called him by his nickname "Dee." Phillips was scared and ran. He told police that he went to Mr. Hill's house, a place where people frequently hung out, and then to his mother's house. It was because Phillips was scared of the real assailants that he lied to police initially. Tr. 315, ll. 12-19; Tr. 439, l. 1 – 445, l. 5; Tr. 446, l. 5 – 447, l. 3.

Though investigators did not request a buccal swab from Phillips initially, they obtained one several months later. Tr. 288, ll. 18-23. Of the swabs submitted for DNA testing, Phillips could not be excluded as a contributor on two samples, Phillips was excluded as a contributor on all other samples, and two samples were not sufficient for testing. According to the South Carolina Law Enfrocement Division ("SLED") analyst, the statistical probability of finding an unrelated individual who could have contributed to the mixture on the gun, i.e the "random match probability," was **one in two hundred** on the swab from the handgun grip and **one in two** on the swab from Decedent's right front pants pocket. Defense counsel objected to the admission of the DNA evidence, arguing that it would be confusing and misleading to the jury and improperly shift the burden of proof to the defense. Tr. 44 – 51; R. * (Defense Motion to Exclude Testimony Relating to DNA). The trial judge ruled that it was a factual issue for the jury to decide. Tr. 50, ll. 7-12; Tr. 51, ll. 21-24.

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[3] Miranda v. Arizona, 384 U.S. 436 (1966).

Voluntariness of Appellant's First Statement

At the Denno hearing, the trial judge heard testimony from Christopher McIntosh, an investigator with the Ridgeland Police Department, and from David Williams and Sean Harley, the SLED investigators who conducted Phillips' interrogation. Phillips also testified. The trial judge also viewed a portion of the video of the interrogation, though it is unclear from the record exactly how much he watched. Tr. 16, l. 13 – 22, l. 6; Tr. 98, l. 13 – 130, l. 11.

McIntosh claimed that Phillips came to the Ridgeland police station voluntarily. Tr. 101, ll. 19-22. However, on cross-examination he admitted that Phillips was driven to the police station by an officer Long, who did not testify at the pre-trial hearing or during Phillip's trial. McIntosh could not account for what was said to Phillips or whether Phillips was given a choice not to come to the station. Tr. 104, l. 25 – 106, l. 19. Phillip's interrogation took place in McIntosh's office, where McIntosh advised Phillips of his Miranda rights before leaving him with the SLED agents. Tr. 99, l. 13 – 101, l. 6; Tr. 102, ll. 1-25. The video of the interrogation shows Phillips telling the officers that he was headed to Waffle House as he enters the office. The following exchange then occurs between McIntosh and Phillips:

INV. MCINTOSH: Dee, let me, um read you something real quick before we start. You know what we want to talk to you about?

PHILLIPS: Yeah, about what happened at, at Ace house.

INV. MCINTOSH: Okay. Before we talk about that, I want to read you this, okay. You have the right to remain silent. **This don't mean you're in trouble or under arrest or anything, okay. But before we talk to anybody about anything, any possible witness, we have to read this. Just, State makes us do it, okay.** You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You

can decide that at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights?

PHILLIPS: Mmm-hmm.

INV. MCINTOSH: Okay. Having these rights in mind, do you wish to talk to us now?

PHILLIPS: Yeah, go ahead.

INV. MCINTOSH: Alright. Tell me what happened tonight.

State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). McIntosh did not have Phillips sign a written waiver of rights.

Both SLED agents admitted knowing that Phillips had smoked marijuana and been drinking alcohol prior to their interrogation though they never asked him the exact amount that he consumed. The agents both claimed that Phillips did not seem impaired. Though the video of the interrogation does not show Phillips passing out drunk, he told the agents repeatedly that he had been smoking marijuana and drinking. In fact, when one of the agents said "You ain't been drunk. You high," Phillips corrected him by saying "No, I am. It's Saturday." When Phillips said that he is a happy drunk, the agent responded that he could tell. Tr. 108, l. 24- 109, l. 7; Tr. 113, ll. 9-18; Tr. 115, l. 15 – 116, l. 5; Tr. 120, l. 6 – 122, l. 1; State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

Investigator Williams told Phillips that he was not under arrest when he asked and testified that Phillips was free to leave at any time. Tr. 110, ll. 2-7. Again, the video of the interrogation provides an accurate reflection of what transpired. It is true that the agents told Phillips that he was not under arrest, but they did not tell him that he was free to leave. In fact, when Phillips indicated that he was going to go to Waffle House since he was not under arrest, the agents told him that they were going to take him to his house to get his probation agent's

phone number first, as Phillips indicated that he would submit to a GSR test once he spoke to her. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

Phillips testified that he was transported to police station in the backseat of a police car and that he could not have gotten out of the car. Tr. 125, l. 21 – 126, l. 8. The officer let him out when they got to the police station and escorted back to meet with the SLED investigators. Tr. 126, ll. 9-17. He did not feel like he had the right to leave during their questioning. Tr. 126, ll. 18-24; Tr. 129, ll. 22-23. Prior to being picked up by the police, Phillips had consumed a few pints of alcohol at Mr. Wood's house and had smoked a total of seven or eight "blunts"[4] throughout the day and was under the influence of those substances during his interrogation. Tr. 123, 20 – 124, l. 1; Tr. 125, ll. 14-20. During the interrogation, Phillips referenced drinking Paul Masson, a dark alcohol. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). If he had not been under the influence, Phillips testified that he would have requested a lawyer and not been so talkative. Tr. 125, ll. 14-20. Though Phillips admitted telling the agents that he was "good" and never said "I'm too high," those actions were themselves the product of his intoxication. Tr. 128, l. 5 – 129, l. 11. Ultimately, he spoke with the agents anyway because he thought that the terms of his probation required him to cooperate with law enforcement. Tr. 125, ll. 2-5.

After hearing the arguments of counsel, the trial judge ruled that Phillip's first statement was admissible. Tr. 130, l. 12 – 132, l. 11; Tr. 132, l. 12 – 134, l. 17. While the trial judge noted that Phillips was not under arrest, to the extent that there were implications of custody, he found that Phillips was given Miranda warnings and waived them. Tr. 132, ll. 12-17. The trial judge

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[4] A "blunt" is a hollowed out cigar filled with marijuana. State v. Odom, 376 S.C. 330, 333 n. 1, 656 S.E.2d 748, 750 n. 1 (Ct. App. 2007).

found that Phillips was not intoxicated based on his review of the video, in which the judge noted that Phillips was not unsteady on his feet, did not have slurred speech, and provided rational answers to the questions. Tr. 132, l. 18 – 133, l. 3. The trial judge further found that Phillips was not of tender years, had prior contacts with law enforcement, and was not of low intelligence. Tr. 133, ll. 4-10; Tr. 133, ll. 24-25. The trial judge placed specific emphasis on the fact that it was not intoxication that caused Phillips to speak with law enforcement, but rather because his probation required him to do so. Notably, Phillips asked to speak with his probation agent several times. Tr. 133, ll. 9-18. The trial judge further found that the interrogation was "only an hour-and-a-half," Phillips was not denied food or breaks, and there were no threats made to him. Tr. 133, l. 25 – 134, l. 5. Based on that the trial judge ruled that statement was voluntary and admissible. Tr. 134, ll. 2-17.

Varied Accounts of April 18, 2013

It is undisputed that Phillips was in and out of Decedent's home throughout the day on Saturday, April 18, 2013. Reginald Green testified that the day prior, he and Phillips were at Decedent's house playing games on Phillip's PlayStation videogame console. When Phillips had to leave, he left his PlayStation and games behind. Green picked Phillips up from Decedent's house in the late morning or early afternoon on the day of the shooting. He claimed that Phillips was upset because Decedent told him that his PlayStation and games were stolen. Phillips did not understand why Decedent would "play [him] like that." Tr. 303, l. 7 – 305, l. 24. Though Green did not represent that Phillips made any threats to the Decedent, the State theorized that the PlayStation served as motive for Phillips' to kill Decedent. Tr. 154, l. 2 – 155, l. 21; 613, l. 9 – 614, l. 9.

Donte Jenkins did not speak to police until October 6, 2015, over two years after Decedent's death. Jenkins claimed that the Decedent's mother, who died prior to Phillips trial, asked him to wait to come forward while she conducted her own investigation. Tr. 325, ll. 20-25; Tr. 327, ll. 7 – 25. Jenkins said that he was at Decedent's house around dusk on the day of the shooting and let Phillips into the house. According to Jenkins, a Playstation was plugged into the television in the living room and Phillips walked straight past it. He said that when he left at approximately 9:15 p.m., Decedent was at the back of his car, working on a tag light with one car door open, and Phillips was still there. Tr. 319, l. 19 – 325, l. 15.

Taylor Cowherd testified that she stopped by Decedent's house at 9:26 p.m. on the day of the shooting. Though the porch light was out, Cowherd said she knew Phillips from around town and saw him standing on Decedent's porch. She claimed that he responded when she called him by his nickname "Dee." Decedent came out of the house and gave her ten dollars to take to his brother, who Cowherd was dating at the time. When she left at approximately 9:30 p.m., she said that Phillips was on the porch and Decedent was working on his car. Tr. 330, l. 1 – 334, l. 4. Cowherd admitted that she was unable to pick Phillips out of a six person photo array[5] that included Phillips' picture. She excused her failure on the fact that she had only ever seen Phillips wearing glasses and that no one in the photo array was wearing glasses. Tr. 334, l. 9 – 335, l. 3. Cowherd admitted that she had previously told police that she saw Decedent get in his car and drive away as she was leaving but was unsure if Dee got in the car with him. However,

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5 When defense counsel requested a copy of the photo array shown to Cowherd during the pretrial hearing, the solicitor indicated that photo array was destroyed when Cowherd did not make a positive identification. Yet, Investigator McIntosh testified at trial that he provided a copy of the photo array to the solicitor's office. Regardless, the trial judge ruled that the defense could argue that Cowherd was unable to identify Phillips and that the state destroyed the array. He also excluded the evidence that Cowherd "identified" Phillips from a single photograph shown to her after the failed photo array. Tr. 34, l. 18 – 44, l. 10; Tr. 408, l. 24 – 409, l. 16. He further granted the defense's request for a spoliation charge. Tr. 604, l. 10 – 605, l. 5.

she claimed at trial that Decedent only cranked the car but may have been just checking the tag light. Tr. 337, l. 6 – 338, l. 21.

According to Shontay "Sunshine" McKeithan, she arrived at Decedent's home at approximately 10:30 p.m. to buy marijuana. She sat outside listening to music and trying to reach Decedent on his cell phone for approximately ten minutes. Davonte Freeman walked up, claiming that he was also there to buy marijuana. They called Decedent's cell phone again and could hear it ringing inside, but he did not answer. After Freeman knocked on the front door twice with no response, he went to the side door and went inside. Tr. 165, l. 16 – 167, l. 19; see also Tr. 184, l. 13 – 186, l. 23. While Freeman claimed he was inside for less than one minute, McKeithan said that he was inside for five to seven minutes. When Freeman finally emerged, he was holding a gun and said "Sunshine he dead. You've got to see him, like, he's dead." McKeithan told him to put the gun back and looked in the through the side door, where she immediately saw Decedent's body. Tr. 166, ll. 11-18; Tr. 167, ll. 20 – 169, l. 2; Tr. 176, l. 20 – 179, l. 20.

Freeman can be heard in the background of McKeithan's 911 call giving a false name of "Larry." Tr. 164, ll. 2-4; Tr, 170, ll. 18-25; State's Ex. 1 (CD 911 call).[6] Freeman said he lied about his name because he thought there was a warrant for his arrest. Tr. 182, l. 16 – 183, l. 13. Freeman admitted that he picked up the gun, explaining that he smelled it "out of curiosity," but denied taking it outside. He claimed that he placed it right back where he found it on Decedent's stomach. Tr. 187, l. 11 – 188, l. 5; Tr. 190, ll. 12-25; Tr. 200, ll. 15-19; Tr. 202, ll. 11-14. Interestingly, Freeman testified that he resided with his brother, Wrenshad Anderson, in a home just minutes walking-distance from the Decedent's home. Tr. 200, l. 23 – 201, l. 9. When

[6] State's Ex. 1 (CD 911 call) is on file with this Court.

Freeman was asked if he and his brother had "each other's back," he responded: "Yes, sir. Always. I'm my brother's keeper." Tr. 201, ll. 17-19.

Almost two and half years after Decedent's death, on September 29, 2015, Anderson came forward as a witness against Phillips. Tr. 363, ll. 6-11; Tr. 357, ll. 8-15. Anderson testified that on the night that Decedent died, Anderson got home from a party at 8:30 p.m. after which he walked to the Short Stop BP station. On his way home from the BP he saw Phillips, who "looked like he had something going on" and was fidgeting. He thought Phillips was either reaching for something around his waistline or trying to hide something. Anderson's account of the time when he saw Phillips varied, with him claiming that it was 8:40 p.m., 9:00 p.m., 9:40 p.m., or sometime before the BP closed at 10:00 p.m. He explained that he had gotten "drunk up" at a party beforehand and "didn't have no clock." Tr. 341, l. 5 – 342, l.25; Tr. 345, l. 1 – 349, l. 10; Tr. 350, ll. 7-20; Tr. 352, l. 16 – 354, l. 25; Tr. 356, l. 2 – 357, l. 2; Tr. 358, ll. 12-24; Tr. 364, l. 6 – 365, l. 10. Anderson finally admitted: "I don't know what time it was." Tr. 361, ll. 7-8. Even so, Anderson said that he was sure that the time in his statement was correct because they went over "a time schedule" when he met with the officer and solicitor. Tr. 357, ll. 3-15.

Regardless, Anderson put himself in the vicinity of Decedent's home at the time he was likely shot. Notably, Paramedic Jessica Horton, who went to the crime scene once police secured it, testified that Decedent's body appeared to have been moved based on the location and pattern of the blood at the scene. She also said that the wounds appeared fresh. Tr. 229, l. 4 – 233, l. 24. Anderson admitted that the electricity had recently been cut off to the house where he and Freeman resided but claimed that he did not need Decedent's money. Tr. 350, ll. 24- 25; Tr. 355, l. 21 – 356, l. 1; Tr. 360, ll. 1-4. Anderson denied being concerned about rumors that his

brother killed Decedent. Tr. 355, ll. 1-5. Officers failed to obtain a buccal swab from Anderson to use for DNA comparison. Tr. 416, ll. 5-8.

Though he was unsure of the time, Reginald Green, who had picked Phillips up from Decedent's house earlier in the day, got a call from Phillips later that night. Phillips offered to buy Green five dollars worth of gas if he would come pick him up and take him to the BP station. Tr. 307, l. 4 – 308, l. 9. Video surveillance showed Phillips buy three beers from the Taylors BP station at 10:43 p.m. While Investigator McIntosh claimed the footage showed Phillips with "a big wad of cash," such could hardly be determined from the low quality video. Tr. 401, l. 20 – 402, l. 14; Tr. 404, l. 20 – 405, l. 11 ; State's Ex. 54 (DVD of BP surveillance footage). Green admitted that Phillips spent approximately twenty dollars that night but said that Phillips had a regular job at Sea Pines, which could have been the source of his money. He said that Phillips was still upset about his stolen Playstation and they smoked marijuana that Phillips brought. In total, they spent an hour and a half or so together before Green dropped Phillips off by the Bank of Walterboro before midnight. Tr. 308, l. 10 – 311, l. 5; Tr. 316, l. 1 – 317, l. 1; Tr. 318, ll. 2-6.

Dawn Childers was one of Decedent's girlfriends of approximately three months. Decedent was supposed to come to Beaufort for a pool party on the night that he died. Tr. 366, l. 18 – 368, l. 1. Childers admitted that she had sent Decedent some "ugly" text message when she found out that he was seeing other women. Tr. 372, l. 2 – 373, l. 4. She also admitted that she and a friend of hers, Taurus Maymi, had seen Decedent's money box and that Maymi said that he should have robbed Decedent. Tr. 373, l. 25 – 374, l. 8.

DNA Evidence

The defense argued that the DNA evidence should be excluded pursuant to Rule 403, SCRE, and because it would result in improper burden shifting. Tr. 44, l. 17 – 47, l. 2. The solicitor said that on the sample taken from the murder weapon, the DNA was a mixture of three individuals. The Report indicated that Decedent, Phillips, and Jason Blessing (an officer who admitted contaminating the evidence), could not be excluded from contributing to this mixture, which she argued "means that their DNA is there." Tr. 47, ll. 5-13. The solicitor confirmed that she was saying that Phillips' DNA was on the weapon. Tr. 47, ll. 19-22. While she admitted that the probabilities were "not great," she claimed that was a matter for cross-examination. Tr. 48, l. 6 – 49, l. 3. Defense counsel argued that the report simply did not say what the solicitor argued. Tr. 47, ll. 23-25 He pointed to the statistical probabilities in the results attached to Phillips, which were one in two hundred for the sample taken from the gun and one in two from the sample taken from the right front pants pocket of the victim. Tr. 49, l. 5 – 50, l. 6; Tr. 50, l. 15 – 51, l. 17. The trial judge ruled that it was factual issue to be decided by the jury and denied the motion to exclude the DNA evidence. Tr. 50, ll. 7-12; Tr. 51, ll. 21-24.

The State called Lilly Gallman as an expert in DNA analysis. Tr. 489, l. 6 – 532, l. 6. Gallman had a Bachelor's of Science degree in biology and began working as a forensic DNA analyst at SLED in 1990. Tr. 489, ll. 9 – 490, l. 12. Defense counsel did not object to her expert qualification but renewed his prior objection to the admissibility of the DNA evidence. The trial judge told defense counsel that he was "protected on the record." Tr. 490, ll. 16-18; Tr. 492, ll. 7-9; Tr. 496, ll. 1-11.

Gallman explained that "everyone's DNA is unique except for identical twins." Tr. 496, l. 21. Thus, she said that she can develop a DNA profile from evidence and then develop a DNA

profile from a known standard "to see whether it matches or does not match." Tr. 496, l. 22 – 497, l. 3. She testified that a full DNA profile has sixteen numbers but sometimes you may be missing some numbers and only able to develop a partial profile. Tr. 497, ll. 7-22. The solicitor asked Gallman, using scissors as an example, "[i]f I had never touched the scissors *and did not leave any cells on it*, would the language be, could not be excluded, or would it be outright excluded?" Tr. 503, ll. 18-21 (emphasis added). Gallman responded: "It would be excluded." Tr. 503, l. 22; see also Tr. 531, ll. 6-11.

Gallman tested two swabs from the handgun, eight swabs taken from Decedent's jeans, three swabs taken from the wall and flooring of Decedent's living room, and three swabs taken from the crime scene, two swabs taken from socks, and one swab from a piece of jewelry. All of the swabs were tested with the exception of one swab from the handgun and one swab from Decedent's left rear pocket that were insufficient for reliable interpretation. Tr. 504, l. 22 – 505, l. 9; Tr. 513, ll. 2-8; Tr. 518, l. 4 – Tr. 525, l. 5; Tr. 529, l. 5 – Tr. 530, l. 8. Gallman had known DNA standards from Phillips, Davonte Freeman, Shontay McKeithan, Jason Blessing, and James Orr to use for comparison. Tr. 491, l. 16 – Tr. 494, l. 24; Tr. 499, l. 24 – 500, l. 13. Deputy Jason Blessing admitted that he contaminated the gun that was taken from the scene by picking it up with an inside-out pair of used gloves. Because of that contamination, he provided a DNA swab for testing several months after the incident. Tr. 220, l. 25 – 222, l. 6; Tr. 288, ll. 10-22.

Phillips could not be excluded as a contributor on only two of the swabs tested, one from the grip of the handgun and one from Decedent's right front pants pocket. Tr. 504, l. 22 – 505, l. 9; Tr. 513, ll. 2-8; Tr. 518, l. 4 – 525, l. 5; Tr. 529, l. 5 – Tr. 530, l. 8. McKeithan and Freeman

were excluded as contributors to those swabs, as were Kevin Smith, Rhett Long, and James Orr.[7] Tr. 505, ll. 10 – 506, l. 6. However, the DNA reports on one of the swabs taken from the handgun and on six of the eight swabs from Decedent's pants pockets, including the right front pocket, found DNA not attributable to the standards tested, i.e. of an unidentified person. Tr. 518, l. 13 – Tr. 525, l. 5. Gallman confirmed that she did not receive a buccal swab for Wrenshad Anderon to test as a standard, though she could have performed such testing within one week. Tr. 530, ll. 19-24. She also testified that exclusion of a person's brother as a contributor does not mean that the person would be excluded. Tr. 529, ll. 21-24.

The DNA profile obtained from swab of the handgun revealed a mixture of at least three individuals. Gallman compared that to the standards that she was given and determined that Decedent, Phillips, and Blessing could not be excluded. Tr. 500, l. 20 – 502, l. 25. The testing also revealed DNA not attributable to standards – of an unknown person – in the mixture from the handgun swab. Tr. 516, l. 25 – 517, l. 5. Regarding the statistical significance of the finding related to Phillips, she said:

> Once I do the comparison, which is the very first step to determine whether the person can be included or excluded from a mixture, we are required to generate, give a statistical value to that particular mixture. We are required to tell you how often you would see this mixture in a population. So the next statement that's on my report is that the probability of randomly selecting an unrelated individual who could have contributed to this mixture is **approximately one in two hundred.** All the information is there, but based on our protocol some of the areas, out of the sixteen, could not be used to generate a statistic or give you a statistical value. So based on the information that I could use to generate a statistic, the value is one in two hundred.

Tr. 503, ll. 1-17 (emphasis added). Gallman agreed with the solicitor's interpretation that the one in two hundred statistic meant that "[i]f you were to take two hundred people and bring them

[7] Kevin Smith and Rhett Long appear to be officers with the Ridgeland Police Department. See Tr. 105, ll. 4-17; Tr. 204, l. 6 – 205, l. 20. There was no explanation during the trial of who James Orr was or why his buccal swab was submitted for testing.

into this room . . . it [is] fair to say that one hundred and ninety-nine of them would be outright excluded." Tr. 507, ll. 2-7.

The following exchange regarding the statistics generated from the handgun swab occurred on cross-examination:

MR. PLEXICO: But you only had a partial DNA profile that matched his [Phillips'] entire profile. Right?

MS. GALLMAN: What I have is a mixture of at least three individuals that I compared to the standards and once I compared them, I could tell whether some person could be included or excluded.

MR. PLEXICO: Okay. And you could tell that because if it was a full match, you would have all sixteen categories. Correct?

MS.GALLMAN: I do have information at all sixteen areas from the chromosomes, but there's only limited information I could use to generate the statistics.

MR. PLEXICO: Okay. All right. **So you didn't have all of my client's DNA on that item #1.1 so that you could say it's him.** That would be one of those, it's him and exclude a billion other people, statistics. Got to be him, **because you didn't have enough of his DNA found -- that's similar to his found on that gun?**

MS. GALLMAN: (No verbal response)

MR. PLEXICO: If you found two out of sixteen, that would mean it was similar and the two you found, he's got those two, but he's also got another fourteen that may or may not match that you don't know about because it wasn't on the gun?

MS. GALLMAN: For item number #1.1, his DNA is at all sixteen areas from the chromosomes, but due to the fact that there are areas that I could not use to generate the frequency of that and to give you a statistical value, I had to put them out. I can only use -- excuse me. I don't want to tell you wrong. I believe I could only use five out of the sixteen. Let me make sure, now. I'm sorry. I could use -- **I could only use ten out of the sixteen to generate that particular number for item #1.1.**

Tr. 513, l. 24 – 515, l. 4. Gallman agreed that the population of the United States was approximately three hundred million but said that the statistics generated cannot be extrapolated over the general population. Tr. 508, l. 9 – 510, l. 6. When asked how many other Americans would match the partial DNA profile obtained the evidence and allegedly "matched" to Phillips, Gallman responded: "I don't know. It's not done like that." Tr. 516, ll. 8-19. Nevertheless, Gallman agreed that she was not saying that she found Phillip's DNA on the gun, but rather that it could not be excluded because it was a mixture of three people. Tr. 516, ll. 20-24. Even so, on redirect, Gallman said: "In order for me to say that someone is not excluded, the vast majority of their information has to be in that sample." Tr. 532, ll. 1-3.

The DNA profile obtained from the swab of Decedent's right front pocket also revealed a mixture of at least three individuals. Decedent and Phillips could not be excluded. Tr. 504, ll. 4-19; Tr. 506, ll. 7-22. Gallman testified: "[T]he next step is to give a statistical value to that mixture and the probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately **one in two**." Tr. 506, l. 22 – 507, l. 1 (emphasis added); Tr. 507, ll. 13-24; Tr. 524, l. 6 – 525, l. 5. Again, Gallman admitted that her testing revealed DNA not attributable to standards – of an unknown person – in the mixture from Decedent's right front pants pocket. Tr. 524, l. 6 – 525, l. 5.

Despite the low statistical significance and high random match probabilities, the solicitor argued to the jury that Phillips' DNA was found on the gun and the pocket. Tr. 617, ll. 5-13; Tr. 627, ll. 10-13; Tr. 631, l. 23 – 632, l. 17; Tr. 634, ll. 1-8. The trial judge gave serious consideration to defense counsel's motion for new trial, in which counsel reasserted his prior objections to the DNA testimony and argued that the jury must have misinterpreted the DNA testimony. The parties disputed what was actually the testimony of the DNA analyst and what

was the solicitor's "interpretation." While the trial judge characterized the expert's testimony as "logically inconsistent," he ultimately denied the motion for new trial finding that there was no contradictory expert testimony and that "the record will speak for itself" as to her actual testimony. Tr. 697, l. 8 – 700, l. 12.

ARGUMENT

I. The trial court erred in admitting Appellant's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the Miranda warnings, Appellant thought he was required to speak with the police under the terms of his probation, and Appellant was high on marijuana and drunk.

Though not under formal arrest, Phillips was the subject of a custodial interrogation when he was questioned by investigators in the wee hours of the morning on April 19, 2013. Phillips was stopped by an officer on the road and told that investigators wanted to speak with him. The officer then drove Phillips to the police station in the back of a locked police car and escorted him to the investigator's office at the Ridgeland Police Department. The Miranda warnings read to Phillips were couched by telling him that he was not in any trouble and that the state "just makes" them read them. Additionally, the investigators were aware that Philips consumed alcohol and marijuana and represented to them that he was drunk and high. Though the investigators began by building a rapport with Phillips and asking him about the timeline of the day, they soon turned to questions about whether Phillips "accidentally" shot Decedent and told him that he would submit to GSR testing and a polygraph examination if he were innocent. Further, the investigators denied Phillips the opportunity to leave when he requested to do so. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Additionally, Phillips testified that he reason he spoke to investigators is that he thought he was required to do so as a term of his probation. Tr. 125, ll. 2-5. Phillips repeatedly asked to speak to his probation officer or to go home and get her phone number but was not permitted to do so. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court indicated "that a defendant in a criminal case is deprived of due process of law if his conviction

is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." Accordingly, a defendant has the right to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. Id. at 376–77. "In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966)." State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010).

In the present case, the trial judge noted that Phillips was not under arrest and was free to leave, as he eventually did later on in the morning. It was on that basis only that the trial judge found that Phillips was not in custody. Tr. 132, ll. 12-17; Tr. 134, ll. 6-8. Thus, the trial judge ignored the body of case law related to the multitude of factors to be considered in determining whether a suspect was in custody, only one of which is whether he was placed under arrest. See, e.g., State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003); State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010).

Even so, the trial judge said that "given the facts of this case, if it was inferred that he [Phillips] was in custody, they gave Miranda warnings and he waived them." Tr. 132, ll. 16-17. Thus, he did ultimately rule upon the validity of the Miranda waiver and voluntariness of Phillips' statements and found that the State meet its burden for the admission of the statement into evidence. Tr. 132, l. 18 – 134, l. 17. However, this ruling was also error because the trial judge failed to give the proper consideration to the fact that the Miranda warnings were diluted, Phillips thought he was required to speak with investigators under the terms of his parole, and Phillips was under the influence of drugs and alcohol.

A. Custodial Interrogation

Phillips was in custody when he gave his first statement. "The purpose of the *Miranda* warnings is to apprise the defendant of [his or] her constitutional privilege to not incriminate [himself or] herself while in the custody of law enforcement." Evans, 354 S.C. at 583, 582 S.E.2d at 410. "Law enforcement must state the *Miranda* warnings after a person has been taken into custody or otherwise deprived of his freedom of action in any way." Id. at 583, 582 S.E.2d at 410 (internal quotations omitted). Custody occurs either upon formal arrest or under ***any other circumstances*** **where the suspect is deprived of his freedom of action in *any* significant way**. See Miranda, 384 U.S. at 444; Berkemer v. McCarty, 468 U.S. 420, 429 (1984). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." Evans, 354 S.C. at 583, 582 S.E.2d at 410. "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." Id.

In State v. Williams, 405 S.C. 263, 276-77, 747 S.E.2d 194, 201 (Ct. App. 2013), this Court provided a long list of factors that courts have considered in determining whether an interrogation was "custodial," including:

> **(1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview**; (2) whether the express purpose of the interview was to question the person as a witness or suspect; **(3) where the interview took place**; (4) whether the police informed the person he or she was under arrest or in custody; **(5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom**; (6) whether there were restrictions on the person's freedom of movement during the interview; **(7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it;**

> **(11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect**; and (13) whether the person was arrested at the end of the interrogation.

(emphasis added). "The formality of arrest is certainly not a prerequisite to a finding of custodial interrogation." United States v. Longbehn, 850 F.2d 450, 452 (8th Cir. 1988) (internal quotations omitted).

In State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003), our Supreme Court upheld the trial judge's suppression of the defendant's statement where the interview lasted three hours and officers challenged the defendant on the answers she gave such that she was in custody. In State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010), our Supreme Court reversed the portion of this Court's opinion that held that Navy's first statement should have been suppressed from his trial for homicide by child abuse because he was in custody at the time of the statement and not Mirandized. Navy's first statement was given to police at approximately 9:00 a.m. at the police station, after officers came to his home to ask him some additional questions. 386 S.C. at 297, 688 S.E.2d at 839. Navy was cooperative, saying that he wanted answers too, and officers agreed to have him back home in time for the visitation for his son, set for 1:00 p.m. that day. Id. He gave the officers an account of the events regarding his son's death, which was largely consistent with his statement at the hospital the night before. Id. at 297-98, 688 S.E.2d at 839. The Supreme Court ruled that because it was "debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given" that "the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record." Id. at 301, 688 S.E.2d at 841.

In the present case, the trial judge failed to engage in a proper examination of the factors relevant to whether Phillips was in custody. Had he done so, it would not have been "debatable"

whether Phillips was in custody. Phillips' contact with law enforcement was initiated by the police, not by Phillips, as Phillips was walking to Waffle House. He was driven to the police department in the backseat of a locked patrol car. The officer let him out the car when they got to the station and escorted him back to Investigator McIntosh's office to meet with the SLED investigators. Tr. 125, l. 21 – 126, l. 24; State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

While McIntosh told Phillips that he could exercise his rights "at any time," the SLED agents did not honor Phillips' request to leave made at approximately fifty minutes into the interrogation. At that point, McIntosh was no longer in the office where Phillips was being interrogated. Phillips asked if he was under arrest and the officers said "nope." Phillips said that he was going to go to the Waffle House right down the road because he was starving. Rather than let him leave, the SLED investigator responded: "We gonna to go the house first."[8] State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Thus, while Phillips was ultimately released because law enforcement did not have probable cause for an arrest, they did not honor his right to terminate the questioning.

The SLED agents averred that the total interrogation lasted approximately one and half to two hours. However, it is notable that it was conducted in the middle of the night, starting sometime between 2:30 and 3:00 a.m. Tr. 109, ll. 8-10; Tr. 114, l. 23 – 115, l. 1; Tr. 117, ll. 9-10; Tr. 119, ll. 6-13; Tr. 124, l. 5. Further, if the first attempt to conduct a GSR test on Phillips occurred at 2:30 a.m. and the actual GSR test was not taken until 5:40 a.m., then the total

[8] Phillips was unwilling to submit to a voluntary gunshot residue ("GSR") test until first speaking with his probation agent, whose phone number was in his cell phone at home. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

interrogation time was over three hours, a significant difference from the investigators' testimony at the pre-trial hearing.[9] Tr. 405, ll. 12-23; Tr. 565, ll. 2-12.

The interrogation started with three officers – one investigator from the Ridgeland Police Department and two SLED investigators. However, the majority of the interrogation was conducted by the two SLED agents, who dominated and controlled the course of the interrogation. While not a constitutional violation since it was not a request for an attorney, the denial of Phillips' requests to contact his probation agent is also relevant to the custody analysis. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

While the investigators began by building a rapport with Phillips, their attitude later turned both aggressive and accusatory and utilized common investigative techniques to pressure Phillips into making inculpatory statements. They invited him to say that he accidentally shot Decedent. Later they told him that he had "something heavy on [his] heart" and that he would submit to the GSR testing and polygraph examination if he was not the shooter. The investigators further pressured Phillips into writing a statement, telling him what to include after deciding what he initially wrote was insufficient. They then asked Phillips if he remembered seeing Decedent laying on the floor and eventually handed him a picture of Decedent's dead body. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Investigator Harley admitted that Phillips was horrified upon being shown the photograph of Decedent. Tr. 435, ll. 1-6. Based on these factors, Phillips was the subject of a custodial interrogation. The trial judges' reliance on only the fact that Phillips was not under arrest was error.

[9] The GSR kit for Phillips was not analyzed because it was taken outside of the six hour window from the alleged time of the shooting. Tr. 562, l. 23 – 564, l. 13.

B. Dilution of *Miranda* Warnings and Involuntariness of Waiver

Phillips waiver of his rights was not voluntary because the investigators diluted the Miranda warnings given to him, Phillips thought that he was required to speak with them under the terms of his probation, and Phillips was under the influence of drugs and alcohol. While these facts may not be dispositive standing alone, in combination they rendered Phillips' statement inadmissible. The trial judge's contrary findings were not supported by the evidence.

The United States Supreme Court has articulated two dimensions to the waiver inquiry: (1) "waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and (2) "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Berghuis v. Thompkins, 560 U.S. 370, 382-83 (2010)). "Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." Moran v. Burbine, 475 U.S. 412, 421 (1986).

i. Dilution of Miranda Warnings

The trial judge found that Phillips was advised of his Miranda rights. Tr. 132, l. 17; Tr. 134, ll. 2-4; Tr. 134, ll.10-11. At the beginning of the interrogation, Investigator McIntosh told Phillips that he was going to "read [him] something real quick before we start." McIntosh then told Phillips he had the right to remain silent, but before reading the remainder of his rights said: **"This don't mean you're in trouble or under arrest or anything, okay. But before we talk to anybody about anything, any possible witness, we have to read this. Just, State makes us do it."** It was after that attempt to downplay the seriousness of their interaction and

classification of Miranda as a mere formality that McIntosh read Phillips his Miranda rights. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

"Courts have recognized a number of circumstances under which the police can impermissibly undermine the meaning or significance of the *Miranda* warnings and fail to reasonably convey their meaning, thus negating the validity of a suspect's waiver of his *Miranda* rights." State v. Meyer, 362 P.3d 745, 752 (Wash. 2015). Courts have held confessions inadmissible, for instance, in cases where the police "downplay the relevance of the warnings and their application to the current questioning." Id. (quoting Doody v. Schriro, 548 F.3d 847, 862–63 (9th Cir.2008) (Doody I)). In State v. Powell, 282 P.3d 845, 856 (Or. 2012), the Oregon Supreme Court upheld the suppression of the defendant's statement where "[t]he officer's comments, assuring defendant as she administered the *Miranda* warnings that they were just 'a matter of housekeeping' and just 'a formality' and that 'it's ultimately up to your company how they want to handle this' negated the dispelling effect that the warnings otherwise may have had." Here, the Miranda warning was likewise undermined by the investigator's statements to Phillips that he was not in any trouble and that this was just something that the state required them to do.

ii. Fifth Amendment Privilege Not Obviated by Probation

Additionally, Phillips testified that he spoke with the investigators because "[a]ccording to the stipulations of [his] probation, we have to cooperate with law enforcement if we get pulled over or if there is an investigation." Tr. 125, ll. 3-5. The trial judge found that, rather than intoxication, it was Phillips' condition of probation that caused him to speak to law enforcement. He further noted that Phillips asked to contact his probation officer several times throughout the interrogation. Tr. 133, ll. 10-18; State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

The Fifth Amendment guarantees that no person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amend. V. In Minnesota v. Murphy, 465 U.S. 420, 425 (1984), the United States Supreme Court wrote:

> A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Thus, a probationer does not forfeit his right against self-incrimination regarding an unrelated criminal investigation.

Here, the trial judge found that the probation condition was the determinative factor in the Phillips' decision to speak with the investigators. Yet, he failed to properly weigh Phillips' belief that his probation *required* his cooperation against the voluntariness of the statement. In reality, Phillips' probation could not have required him to speak with law enforcement regarding Decedent.

iii. Intoxication a Relevant Factor to Voluntariness

The trial judge further erred in finding that Phillips was not intoxicated during his interrogation because he was steady on his feet, his speech was not slurred, and he was able to provide rational answers to the investigators' questions. Tr. 132, l. 18 – 133, l. 3. Among the factors to consider is the defendant's physical condition. Greenwald v. Wisconsin, 390 U.S. 519 (1968). Respondent will likely cite our Supreme Court's opinion in State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973), in which it held that "proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a

matter of law, unless the accused's intoxication was such that he did not realize what he was saying." However, even if Phillips' level of intoxication did not alone warrant the suppression of his statement, it was a relevant factor in determining voluntariness. See People v. Dale, 981 N.Y.S.2d 821, 823-24 (App. Div. 3d Dep't 2014) ("A defendant's intoxication at the time that he or she makes a statement while in police custody is one factor to be considered in determining voluntariness").

Here, the trial judge's finding that Phillips was not intoxicated was not supported by the evidence. The video of the interrogation reveals that Phillips told law enforcement several times that he had been smoking marijuana both with Decedent during the day and after he left the Decedent's house and that he drank Paul Wesson. The investigators made statements that the marijuana used by Phillips was "some good mix" and "Paul had you." Perhaps most telling was when one of the investigator told Phillips: **"You ain't drunk. You high."** Phillips corrected him, saying: **"No, I am. It's Saturday."** The investigator laughed while saying **"You puffin' and drinkin' at the same time."** While Phillips said "I'm good though," he had explained that he was a happy drunk and said that he can walk down the street without staggering and keep to himself. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Thus, the video of the interrogation belied the investigators testimony that they did not know that Phillips was high and drunk. See Tr. 113, l. 12-18; Tr. 120, l. 6 – 122, l. 1.

In summary, the trial judge erred in finding that Phillips was not in custody and that he validly waived his Miranda rights with respect to his first statement. Phillips was prejudiced by the admission of his first statement because, in this entirely circumstantial case, the solicitor was able to argue that his inconsistent statements to police were evidence of guilt. See Tr. 634, l. 9.

II. The trial court erred in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because they results were of such weak statistical significance.

Defense counsel argued for the exclusion of the DNA evidence[10] with respect to two samples where Phillips could allegedly not be excluded as a contributor because, due to their weak statistical significance, their probative value was outweighed by danger of unfair prejudice, confusion of the issues, and misleading to the jury. He further argued that the evidence improperly shifted the burden of proof to the defendant to prove himself innocent. According to the State's DNA expert, Phillips DNA could not be excluded as a contributor to the mixtures of DNA from the swab of the handgun grip or the swab of Decedent's right front pants pocket. With respect to the gun, the probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two hundred. With respect to the pants pocket, the probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. In United State v. Graves, 465 F.Supp. 2d 450 (E.D. Pa. 2006), the defendant moved to exclude DNA evidence from his trial for armed bank robbery. The government sought to introduce DNA analysis from an umbrella allegedly used and discarded by the robber and a pair of sneakers taken from Grave's girlfriend's residence that purportedly

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[10] For a discussion of nuclear DNA typing using the short tandem repeat multiplexing (STR) technique, see Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489 (2008).

matched shoe prints from the teller counter. 465 F.Supp. 2d at 452-53. Grave's argued "because of the low statistical significance of the DNA evidence, its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues under Rule 403, FRE." Id. at 457.

The government argued in Graves that the statistical significance went the weight of the evidence rather than its admissibility. Id. The DNA report regarding the sneakers indicated the presence of DNA from three or more individuals. Id. at 453-545. The probability of selecting an unrelated individual at random from the African American population who could be a potential contributor ("random match probability") to the mixture of DNA detected was 1 in 2,900 for the left sneaker and 1 in 3,600 for the right sneaker. Id. at 454. For the umbrella, the DNA report indicated the presence of DNA of more than one individual and listed a random match probability of approximately 1 in 2. Id.

In ruling that the DNA evidence related to the sneakers was admissible but that the DNA evidence regarding the umbrella was inadmissible, the Graves Court noted the Third Circuit Court of Appeals' recognition that "overtly probabilistic evidence is no less probative of legally material facts than other types of evidence." Id. at 457 (quoting United States v. Hannigan, 27 F.3d 890, 893 n. 3 (3rd Cir. 1994). While the Graves Court recognized that some courts have admitted DNA evidence even when the statistical significance of the data was relatively low and the probability of a random match in the relevant population was rather high, it recognized the potential danger "for the jury to misconstrue the statistical significance of the DNA evidence." Id. at 458-59. The Graves court ruled that the sneaker DNA evidence was admissible because it had a far greater random match probability and in light of the safeguards of cross-examination, proper explanations, and clarifying jury instructions. Id. at 459. However, the Court ruled that

sneaker evidence was admissible, writing: "In contrast, **even with appropriate safeguards, the minimal probative value of the umbrella DNA evidence-in which half of the relevant population cannot be excluded as a contributor to the DNA sample-is substantially outweighed by the danger of unfair prejudice and confusion of the issues.**" Id. (emphasis added).

In the present case, the random match probability for the handgun swab was 1 in 200 and for the pants pocket swab was 1 in 2. Tr. 503, ll. 1-17; Tr. 506, l. 22 – 507, l. 1; Tr. 507, ll. 13-24; Tr. 524, l. 6 – 525, l. 5. Thus, the random match probability for the handgun swab was far greater than the sneakers in Graves of 1 in 2,900 and 1 in 3,600. The random match probability for the pants pocket swab was the same as the umbrella excluded in Graves. As such, the DNA evidence was likewise of low statistical significance and minimal probative value, though the jury could hardly have realized that from the solicitor's heavy reliance upon it in her closing argument. Its value did not outweigh the danger of unfair prejudice, confusion of the issues and its admission improperly shifted the burden to the defense. The jury was ultimately misled.

Additionally, it is notable that there was DNA of an unknown person on both of those swabs as well as on six other swabs of from Decedent's pants. Tr. 516, l. 25 – Tr. 525, l. 5. With respect to the handgun, Gallman testified that she could not exclude Decedent, who owned the gun; Blessing, who admitted to picking the gun up with an inside-out pair or used gloves; or Phillips from the mixture. However, there was also DNA not attributable to any of the standards. Tr. 500, l. 20 – 502, l. 25; Tr. 516, l. 25 – 517, l. 5. Gallman testified that she determined based on the evidence submitted that there were three contributors to DNA mixture. She specifically testified that her determination of the number of contributors was not based on the number of standards that she could exclude. Tr. 514, l. 10 – 516, l. 7. Thus, it would stand to reason that, if

the mixture was of only three people and includes unknown DNA, that only two of the three persons who could not be excluded could have actually contributed to the mixture on the handgun. This seems inconsistent with Gallman's testimony: "In order for me to say that someone is not excluded, the vast majority of their information has to be in that sample." Tr. 532, ll. 1-3.

With the DNA evidence admitted, the solicitor relied heavily upon it in her closing, arguing to the jury:

> **We also know that the Defendant's DNA cannot be excluded from inside that pocket.** You saw the picture of Darius. You saw the picture of him with that gun, his gun on his stomach. I want you to look at that picture. His pocket is also pulled out. Somebody went through that pocket. **Somebody went through both of his pockets and that was the Defendant. Remember the scissors example. If you don't touch it, you're excluded. If you don't touch it, you're excluded. Defendant was not excluded.**

Tr. 617, ll. 5-13 (emphasis added).

> Anything linking to him that could possibly be on that gun? **Well, we have his DNA on that gun. We know he touched it** and we know it wasn't because he was playing police. That's a story that does not make sense.

Tr. 627, ll. 10-13 (emphasis added).

> I also want you to remember Lilly Gallman. She was the DNA expert. **And her testimony, while as streamlined as we tried to keep it, is <u>confusing</u>.** What I want you to remember though is, **I want you to remember the scissors analysis that Ms. Masser was able to talk to Ms. Gallman about. If you don't touch it, you are automatically excluded.** One hundred percent excluded. If you do not touch it, you are excluded. If I don't touch this notepad, I am excluded, but if I touch it, I can't be excluded. My cells have been left behind on this item. And why does it happen with the pockets of Darius' jeans that night? **The reason the Defendant cannot be excluded, his DNA cells are there is because he was going through them after he shot and killed him.** He didn't do Darius' laundry. There's no explanation for why else his DNA would be in there. He didn't wear these jeans. He was going through his dead friend's pockets to rob him after he murdered him. Look, it's pulled out. This pocket's empty. He went through this pocket first, felt nothing in there. The cash was in this pocket. He grabbed it. He left.

Tr. 631, l. 23 – 632, l. 16 (emphasis added).

> **We also know that Defendant's DNA is on the murder weapon and inside Darius' pocket. Had his DNA not been there, he would have been excluded.** If I don't touch this, my DNA is excluded. My DNA is not there. If I touch it. I cannot be excluded. **Had he not touched the gun or the pocket, his DNA would not be there. And we know he touched the gun when he shot and killed Darius and we know he touched the pocket when he robbed him of his cash.**

Tr. 634, ll. 1-8 (emphasis added). In addition to admitting that the DNA evidence was confusing, the solicitor overstated the evidence. The expert explicitly testified that she could not say that Phillips' DNA was on the handgun or pocket. Tr. 516, ll. 20-24. Rather, she could not exclude Phillips from the DNA mixtures on two of the swabs and provided random match probability statistics, which in this case were extraordinarily high. Notably, however, the solicitor made no mention of the statistics.

The trial judge erred in failing to exclude the DNA evidence with respect to the gun and the pants pocket. Defense counsel predicted that the evidence would be confusing and misleading to the jury, and it was. No counter-expert testimony was necessary for the judge to rule on the Rule 403 objection. Further, even if the evidentiary rules only required exclusion of the pants pocket swab with a one in two random match probability, the error in its admission was prejudicial to Phillips. He had provided the investigators with an explanation of why his DNA could have been on Decedent's gun but there was no innocent explanation for how his DNA would have gotten on the pocket of Decedent's pants.

CONCLUSION

Based on the foregoing, Appellant Billy Phillips respectfully requests that this Court reverse his convictions and remand his case for a new trial.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
OCT 17 2016
SC Court of Appeals

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

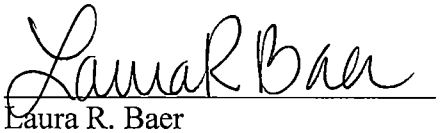
V.

BILLY PHILLIPS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Billy Phillips, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of October, 2016.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: April 26, 2027.