

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Jasper County
Honorable Michael G. Nettles, Circuit Court Judge

Op.No. 2018-UP-081 (S.C.Ct.App. filed February 14, 2018)

2014-GS-27-00312; 2014-GS-27-00602

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

PETITIONER,

Appellate Case No. 2018-000977

RETURN TO AMENDED PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

- I. Whether the Court of Appeals erred in finding that the trial court did not err 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, Petitioner thought he was required to speak with the police under the terms of his probation, and Petitioner was high on marijuana and drunk?

- I. Whether the Court of Appeals erred in finding that the trial court did not err in admitting the DNA analyst's expert testimony regarding two items on which Petitioner 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 the results were of such weak statistical significance?

RESPONDENT'S STATEMENT OF THE CASE

Respondent accepts the "Statement of the Case" in the Petition for Writ of Certiorari,

p. 2.

RESPONDENT'S STATEMENT OF FACTS

Respondent incorporates by reference its Final Brief of Respondent, p. 3-8.

ARGUMENT

- I. The Court of Appeals reasonably affirmed that the trial court did not abuse its discretion in ruling Petitioner’s first statement was admissible where Petitioner was given proper *Miranda* warnings, even though they were not required because Petitioner was not “in custody” at the time of his statement, and the totality of the circumstances demonstrate that Petitioner made a knowing, voluntary waiver of his *Miranda* rights and that he was not intoxicated.**

The trial judge did not abuse his discretion in holding that Petitioner’s statement was admissible. First, the court held Petitioner’s statement was non-custodial. Second, even if viewed as custodial, Petitioner was properly advised of his *Miranda* rights, which he knowingly and voluntarily waived. The court also concluded as a fact that Petitioner was not intoxicated. Evidence supports these conclusions. Finally, even if viewed as error to admit Petitioner’s statement, it was harmless beyond a reasonable doubt. These conclusions are supported by the facts and the law. The Court of Appeals affirmed the admission of the first statement State v. Phillips, No. 2016-000108, 2018 WL 1040306, at *1 (S.C. Ct. App. Feb. 14, 2018). Certiorari is not warranted.

How the Issue Was Raised at Trial: Jackson v. Denno¹ Hearing

Investigator Christopher McIntosh, of the Ridgeland Police Department, interviewed Petitioner during the early morning hours of May 19, 2013. (R.p. 60, lines 4-24). The recorded interview took place in McIntosh’s office at the police department. (R.p. 61, lines 7-8; State’s Ex. 58). According to McIntosh, Petitioner did not appear to be under the influence of any substances or have any mental defects that impaired his ability to understand his rights. (R.p. 61,

¹ *Jackson v. Denno*, 378 U.S. 368 (1964)

lines 9-15). McIntosh testified Petitioner was not under arrest at the time of the interview and was free to leave at any time. (R.p. 62, lines 15-18). Furthermore, Petitioner was never denied breaks during the interview nor was he threatened or promised leniency in exchange for talking with the police. (R.p. 62, lines 7-14). Before beginning the interview, McIntosh read Petitioner his *Miranda* rights from a form provided by the police department. (R.p. 63, lines 1-8, State's Ex. 58). Petitioner then waived his rights and said he wished to speak with officers. (R.p. 63, line 25- p. 64, line 2). A few minutes into the interview, McIntosh had to leave to gather paperwork for a search warrant. (R.p. 61, line 22- p. 62, line 4). The two other officers in the interview, SLED Agents David Williams and Shaun Harley, continued the interview with Petitioner. (R.p. 62, lines 5-6).

Agent David Williams testified that Petitioner was advised he was not under arrest during the questioning at the police station. (R.p. 71, lines 1-7). According to Williams, Petitioner was not denied any breaks during the hour and a half interview. (R.p. 70, lines 8-15). Petitioner was free to leave at any time and did in fact leave after the interview concluded. (R.p. 71, lines 6-7; p. 72, lines 8-10). After waiving his *Miranda* rights, Petitioner voluntarily spoke with Williams regarding the investigation and never asked for an attorney. (R.p. 71, lines 15-25). Even though Petitioner admitted to smoking marijuana earlier in the night, Williams observed that Petitioner's ability to understand and rationalize was not impaired. (R.p. 69, line 19- p. 70, line 7).

Agent Shaun Harley testified Petitioner understood the purpose of the interview was to discuss the murder of Darius Woods. (R.p. 76, lines 6-14). Petitioner told Harley that he had smoked some blunts² and drank Paul Masson earlier that night. Upon learning that Petitioner had

² Investigator Hurley explained that a "blunt" is commonly known to contain marijuana for smoking. (R.p. 76, lines 20-21).

smoked marijuana and drank alcohol, Harley asked Petitioner several times if he understood the nature of the interview. (R.p. 76, line 24 – p. 77, line 2). Petitioner responded that “he understood and he was okay”. (R.p. 77, lines 2-3). Indeed, Harley testified that Petitioner appeared to understand all of his questions and did not have any visible mental or physical defects. (R.p. 77, lines 19-25). Additionally, Harley testified Petitioner gave rational answers to the questions posed by officers. (R.p. 80, lines 14-18).

Petitioner testified at the *Jackson v. Denno* hearing and admitted to smoking marijuana and drinking alcohol the night of the murder. (R.p. 84, line 20 – p. 86, line 1). He claimed that he spoke to officers because he was under the influence. (R.p. 86, lines 6-9). However, on cross examination Petitioner admitted that he had been arrested numerous times on unrelated charges and thus was aware of police procedures. (R.p. 88, line 15 – p. 89, line 4). Moreover, Petitioner conceded that he talked to the officers voluntarily and understood the nature of their questions. (R.p. 90, lines 12-19).

The Trial Court’s Finding of Admissibility

The trial judge reviewed the recorded interview and heard arguments from both the State and defense regarding the statement’s admissibility. Following defense counsel’s argument the statement should be excluded because Petitioner was too intoxicated to rationally exercise his rights, the trial court ruled Petitioner’s statement on May 19, 2013 was admissible. Specifically, the court held:

“With regard to the issue of whether or not he was in custody, clearly, he was not in custody because he was released and free to go after he voluntarily gave an interview, however, in the event, given the facts of the case, if it was inferred that he was in custody, they gave *Miranda* warnings and he waived them.

I’ve had an opportunity to review the Defendant’s demeanor on the video and it appears to me as he was walking in that he was not unsteady on his feet, he did

not have slurred speech. He appeared to listen to the questions and gave very rational answers. I noticed on the video that he had sort of a stammer, which caused me some pause, but as he testified from the witness stand, he had that very same stammer. His demeanor seemed to be exactly the same on the witness stand as it did on the video. The video will speak for itself and it is there for appellate review. My observation is that he was not intoxicated.

With regard to the voluntariness, clearly, he's not of tender years. Once again, he's an older gentleman. No one has said exactly how old he is, but he's not of tender age. He's served some time in federal prison. He's had a number of criminal convictions. Throughout those criminal procedures he's spoken with law enforcement. He's indicated that was indeed the case. I think it's particularly important to note that in order to say that the statement was involuntary because he was intoxicated, he seemed to indicate that it was the drugs that allowed him to speak with law enforcement, that is not his testimony at all. The reason why he did it was that his probation required that he do that. He did have the wherewithal, the presence of mind to ask for his probation agent. He had a very rational discussion with regard to that.

With regard to the issue of intoxication and how that affects voluntariness, I'm going to make a ruling on that. Ultimately, it is a factual question for the jury and he will be allowed to present any arguments consistent with involuntariness, consistent with intoxication. He can do that with or without his testimony during trial. There's been no testimony about any low intelligence. The interview was only an hour-and-a-half, which I found reasonable. I understand he was not denied access to food or breaks. It's clear the officers have testified and I've seen on the video that he was given his *Miranda* warnings and he waived those. There were no threats given. He was free to leave because he was, indeed, not arrested. In the event that he were to make the determination that he was under arrest, even though he left thereafter, he waived his *Miranda* rights. I believe that based on what I've heard and based on the officer's testimony and what I've seen on the video, he was given his *Miranda* rights, he understood his *Miranda* rights, and he waived the *Miranda* rights and I specifically find that the statement was freely and voluntarily given. However, once again, that's a question of law that's been put before me. I find that it is admissible, however those issues are questions of fact that can be presented to the jury and I will give you wide latitude in that regard."

(R.p. 93, line 12 - p. 95, line 17).

Standard of Review

The admission or exclusion of evidence rests on the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564

S.E.2d 87, 93 (2002); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). The conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless the conclusion was so manifestly erroneous as to show an abuse of discretion. *State v. Livingston*, 223 S.C. 1, 6, 73 S.E.2d 850, 852 (1952); *see also State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990).

Discussion

Petitioner Was Not in Custody

The trial court properly held and the record clearly supports that Petitioner was not “in custody” or its functional equivalent during the May 19, 2013 interview. R. 93, l. 12 -16. The record demonstrates that Petitioner voluntarily came to police department to talk with law enforcement. Investigator McIntosh testified at trial, “He came of his own accord. He was given a ride by Officer Long, who encountered him at the Green and Main Street intersection.” (R.p. 328, lines 23-25). Moreover, Petitioner was asked at the *Jackson v. Denno* hearing, “So, you were there voluntarily.” Petitioner responded, “Yes.”(R.p. 90, lines 12-13).

Whether a person is "in custody" is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of the interrogation, and whether the suspect was free to leave the place of questioning. *State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010). "To determine whether a suspect was in custody for the purposes of *Miranda*, the [United States] Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Williams*, 405 S.C. at 273, 747 S.E. at 199 (citing *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010)). Furthermore, the mere fact that an interview takes place at a police station and by the initiation of officers does not render it a custodial interrogation. *Williams*, 405 S.C. at 275, 747 S.E.2d at 200; *see also Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (“[P]olice officers are not required to administer

Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.” “Rather, the fact a defendant voluntarily agreed to accompany investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation.” *State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). Additionally, the fact that *Miranda* warnings are given does not convert a noncustodial situation into a custodial one. *Id.*

Petitioner was not under arrest at the time of the questioning. At the *Jackson v. Denno* hearing, the officers who participated in the interview testified that Petitioner was not under arrest. (R.p. 62, lines 15-18; p. 71, lines 1-7). In fact, Petitioner was not arrested for the murder of Darius Woods until April or May of 2014. (R.p. 233, lines 19-21). Also, Petitioner knew that he was not under arrest at the time of the interview. While reading Petitioner his *Miranda* rights, Investigator McIntosh informed Petitioner he was not “in trouble or under arrest or anything”. (State’s Ex. 58 at 00:45). The interview lasted only an hour and a half. (R.p. 70, lines 8-10). Petitioner was free to leave at any time and did in fact leave after the interview concluded. (R.p. 71, lines 6-7; p. 72, lines 8-10). Petitioner was informed about the nature of the interview and he voluntarily agreed to discuss the matter with officers. (R.p. 76, lines 6-14). From a review of the recorded interview, Petitioner was not handcuffed or shackled. (State’s Ex. 58). Thus, Petitioner’s freedom of movement had not been restricted. *State v. Caulder*, 287 S.C. 507, 515, 339 S.E.2d 876,881 (Ct. App. 1986). Based upon the aforementioned reasons, a reasonable person would not have believed he was “in custody” during the interview. The record additionally supports the trial court’s ruling that Petitioner was not in custody because he voluntarily participated in the interview and he was not “deprived of his freedom of action in any

significant way”. *State v Williams*, 405 S.C. 263, at 272, 747 S.E.2d 194, 199. Therefore, Petitioner was not in custody and *Miranda* did not apply.

Under the Totality of the Circumstances, Petitioner Made a Knowing and Voluntary Waiver of his Miranda Rights.

Assuming for sake of argument Petitioner was in custody, the record supports the trial court’s finding that *Miranda* warnings were properly given and waived. See *Miranda v. Arizona*, 384 U.S. 436, 478-479 (1966); *Moran v. Burbine*, 475 U.S. 412, 421 (1986). “In South Carolina, the test for determining whether a defendant’s confession was given freely, knowingly, and voluntarily focuses upon whether the defendant’s will was overborne by the totality of the circumstances surrounding the confession.” *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct.App. 2010). Factors to consider include “background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.” *Id*, 390 S.C. at 513-514, 702 S.E.2d at 401.

The Miranda warnings were not diluted warnings

Petitioner claims his waiver of rights was not voluntary because the investigators diluted the *Miranda* warnings. Specifically, Petitioner argues that Investigator McIntosh’s statements “this don’t mean you are in trouble or under arrest or anything” and “the State makes us do it” undermined Petitioner’s *Miranda* warnings and portrayed them as “mere formality”. However, a review of the recorded interview clearly shows that Investigator McIntosh properly conveyed

Petitioner's *Miranda* rights to him. Moments after arriving at the police station, the following took place between Petitioner and Investigator McIntosh:

McIntosh: Let me read you something...real quick...before we talk.

McIntosh: You know what we want to talk to you about?

Petitioner: Yeah about what happened at Ace house.

McIntosh: OK. Before we talk about that I want to read you this ok?

McIntosh: You have the right to remain silent. This don't mean you are in trouble or under arrest or anything ok but before we talk to anybody about anything any possible witnesses we have to read this, State makes us do it ok.

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 are 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 at any time to exercise these rights and not answer any questions nor make any statements. Do you understand each of these rights?

Petitioner: Uh huh.

McIntosh: OK. Having these rights in mind do you wish to talk to us now?

Petitioner: Yeah go ahead.

(State's Ex. 58 at 00:17-01:15).

It is sufficient if the warnings reasonably convey to a suspect his rights as required by *Miranda*. *State v. Easler*, 471 S.E.2d 745, 749 (S.C. App. 1996), *aff'd as modified*, 489 S.E.2d 617 (S.C. 1997). A "talismanic incantation" is not required. *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981). Contrary to Petitioner's argument, *State v. Powell*, 282 P.3d 845 (Or. 2012) is not analogous to the case at hand. *Powell* dealt with an initial, coerced confession and a second confession after the suspect had been given *Miranda* warnings. Under that scenario, the court explained the second statement must be excluded unless the improper

coercion that compelled the first set of statements had been dispelled before the second set of statements were made. The Court held the officer's comments that *Miranda* warnings were "just a matter of housekeeping" and "a formality" negated the dispelling effect that the warnings may have had. Since the coercive effect of the prior inducement was not dispelled, the second statement was not admissible. Petitioner's case is not one of a prior coerced confession. Proper *Miranda* warnings were given to Petitioner at the onset of the first interview. Additionally, Investigator McIntosh never used the term "formality" to refer to Petitioner's rights. Investigator McIntosh simply explained to Petitioner that he was not under arrest, and, out of abundance of caution, he was going to inform Petitioner of his constitutional rights. Furthermore, Petitioner testified at the *Jackson v. Denno* hearing that he was familiar with police procedures as he had been arrested numerous times. (R.p. 88, line 15 – p. 89, line 4). Respondent submits Petitioner was fully aware of the meaning and importance of his *Miranda* rights as he had been read his rights in prior police encounters.

Petitioner's *Miranda* warnings were not diluted or undermined by Investigator McIntosh's statements in any way. Investigator McIntosh's challenged statements further highlighted the importance of Petitioner's rights. *People v. Thames*, 344 P.3d at 898. Petitioner's *Miranda* rights were reasonably and effectively conveyed to him. *State v. Easler*, 471 S.E.2d at 749. Therefore, Petitioner made a knowing and voluntary waiver of his rights.

Subjective Belief based upon Condition of Probation

Petitioner next argues his statements on May 19, 2013 were involuntarily made because he believed he was required to speak with investigators due to the conditions of his probation. Petitioner's argument is without merit as he was not "compelled" to speak with investigators nor was he threatened with a revocation of his probation if he failed to do so.

Volunteered statements, whether exculpatory or inculpatory, stemming from custodial interrogation or spontaneously offered up, are not barred by the Fifth Amendment. *State v. Kennedy*, 325 S.C. 295, 307, 479 S.E.2d 838, 844 (Ct.App.1996) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Therefore, if a witness “makes disclosures instead of claiming the privilege, the government has not ‘compelled’ him to incriminate himself.” *Garner v. United States*, 424 U.S. 648, 654, 96 S.Ct. 1178, 1182, 47 L.Ed.2d 370 (1976). See *State v. Linnen*, 278 S.C. 175, 293 S.E.2d 851 (1982)(statements were given freely and voluntarily, and were therefore admissible, even though interrogating officers encouraged the statements, where officers were not coercive or threatening and statements were not procured by improper influence).

Petitioner cites to *Minnesota v. Murphy*, 465 U.S. 420 (1984) to argue his statements were involuntary because he felt he was required to speak with investigators as a condition of his probation. In addressing a probationer’s Fifth Amendment right against self-incrimination, the United States Supreme Court held:

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.

Id. at 425.

Here, the investigator’s never stated or implied that Petitioner was in jeopardy of having his probation revoked if he invoked his Fifth Amendment right against self-incrimination. Petitioner was not required to appear at the police station as a condition of his probation.

Petitioner voluntarily agreed to speak with investigators and was free to leave at any time. Even if Petitioner subjectively believed that he was required to speak with investigators regarding matters unrelated to his probation, that belief would be unreasonable. *Murphy* noted that even if Murphy did harbor a belief that his probation might be revoked for exercising the Fifth Amendment privilege, his belief would not have been reasonable in light of the many decisions that have made clear that the State could not constitutionally carry out a threat to revoke probation for legitimately exercising the Fifth Amendment privilege. *Id.* Petitioner's status as a probationer has no bearing on the voluntariness of his statements. Petitioner did not invoke his Fifth Amendment right against self-incrimination and investigators did not coerce or compel him to speak with them, his statements were voluntarily made.

Intoxication

Petitioner claims his intoxication precluded his knowing waiver of rights. Intoxication is one factor to be considered by the trial court in determining voluntariness and validity of a waiver of *Miranda* rights. Evidence of possible intoxication alone is insufficient to require a statement to be excluded. "Proof of accused's intoxication short of rendering him unconscious of what he is saying, does not require, in every case, that statements he made while in that condition be excluded from evidence." *State v. Collins*, 266 S.C. 566, 573, 225 S.E.2d 189, 193 (1976); *State v. Saxon*, 261 S.C. 523,529, 201 S.E.2d 114, 117 (1973) (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). The mere fact of drug or alcohol use does not preclude a finding of a knowing and voluntary waiver of rights.

In the instant case, all three investigators who conducted the interview on May 19, 2013, testified Petitioner did not appear under the influence of any intoxicants. (R.p. 61, lines 9-15; p. 69, lines 19-23; p. 77, lines 19-25). Investigator Williams testified he would not have questioned Petitioner if he felt Petitioner was under the influence or lacked the ability to understand. (R.p. 232, lines 16-19). Even though Petitioner admitted to the investigators he had smoked marijuana and drank alcohol earlier that night, the investigators testified Petitioner's ability to understand and rationalize was not impaired. (R.p. 69, line 19- p. 70, line 7). In fact, upon asking Petitioner if he understood the nature of the questioning, Petitioner responded that "he understood and he was okay". (R.p. 77, lines 2-3). Moreover, Petitioner testified that he talked to the officers voluntarily and understood the nature of their questions. (R.p. 90, lines 12-19). Additionally, in ruling that Petitioner was not intoxicated, the trial judge compared Petitioner's demeanor on the witness stand to that in the interview and found Petitioner's demeanor had not changed. (R.p. 93, line 18 – p. 94, line 3). The trial judge also found Petitioner appeared to listen to the questions posed to him and respond with rational answers. (R.p. 93, lines 21-22).

Therefore, the recorded interview and witness testimony established that Petitioner, if impaired at all, was not impaired to such a degree that his statements were rendered involuntary at the time they were made. Accordingly, Petitioner's claim of intoxication is without support and the trial judge did not err in declining to exclude Petitioner's statements due to alleged intoxication.

Totality and Other Factors Considered Supports Admission

The trial judge properly considered the totality of the circumstances in determining whether the State met its burden of proving Petitioner's confessions were knowingly and voluntarily given. In addition to considering Petitioner's alleged intoxication, the trial judge also

analyzed other factors in determining Petitioner's waiver was voluntary. First, as to background and experience, Petitioner testified at the *Jackson v. Denno* hearing that he was familiar with police procedures as he had been arrested numerous times. (R.p. 88, line 15 – p. 89, line 4); *See United States v. Pruden*, 398 F.3d at 246. Second, the trial judge opined that Petitioner was “not of tender years” and was “an older gentleman”. (R.p. 94, lines 4-6). Third, Petitioner's interview lasted only one hour and a half. (R.p. 72, lines 6-7). Fourth, regarding promises or threats made by police, no such conduct was present in Petitioner's case. (R.p. 62, lines 7-14). Lastly, Petitioner was never denied breaks and was free to leave at any time. (R.p. 70, lines 8-15).

Accordingly, Respondent submits under the totality of circumstances Petitioner's waiver of his *Miranda* rights was clearly voluntary.

Harmless Error

Even assuming *arguendo*, Petitioner was in custody and his statement was admitted in violation of *Miranda*, its admission was harmless beyond a reasonable doubt. *Arizona v. Fulminante*. 499 U.S. 279, 310, 111 S.Ct. 1246 (1991) (holding error in admission of involuntary confession is subject to harmless error analysis); *State v. Easler*, 327 S.C. 121, 129, 489 S.E.2d 617, 621–22 (1997) (any error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis).

Considering the entire record on appeal, any error in admitting Petitioner's statements to investigators on May 19, 2013, was harmless beyond a reasonable doubt. Through the testimony of Taylor Cowherd and Shontay McKeithan, the State established that the victim was killed sometime between 9:25 p.m. and 10:00 p.m. on May 18, 2013. (R.p. 112, line 4; p. 113, lines 7-11; p. 276, lines 8-14). Cowherd's testimony placed Petitioner alone with the victim within the timeframe of the murder. (R.p. 280 lines 1-2). The State established through the testimony of

Reginald Green that Petitioner was upset with the victim for lying to him about the Playstation video game. (R.p. 250, line 7 – p. 251, line 20). Also through Reginald, the State was able to establish that Petitioner did not have any money or drugs on him earlier in the afternoon. (R.p. 252, lines 3-18; p. 254, lines 4-14). However, through Reginald's testimony and video surveillance, the State was able to prove that Petitioner possessed a large amount of money and marijuana after the victim was murdered. (R.p. 255, lines 8-9; p. 345, line 20 - p. 348 line 14). Donte Jenkins testified that he observed a Playstation at the victim's home the night of the murder. (R.p. 266, line 16 – p. 267, line 1). However, officers testified that no such Playstation was located during the search of the victim's home. (R.p. 367, lines 14-20). Donte also testified he left the victim's house between 9:00 to 9:15 p.m., leaving behind only Petitioner and the victim at the house. (R.p. 271, lines 7-15; p. 273, lines 7-10). Wrenshad Anderson testified he observed Petitioner walking down the street the night of the murder acting strange, as if he was trying to hide something. (R.p. 292, lines 7-10). Investigator McIntosh presented evidence of surveillance footage from a local gas station that showed Petitioner carrying a large sum of money a short time after the victim was killed. (R.p. 345, line 20 - p. 348 line 14). Witnesses testified the victim carried a large amount of money in his pocket. (R.p. 215, lines 2-13). Officers testified no money was found on the victim or in his house. (R.p. 367, lines 14-20). The State was able to establish the victim was killed by his own gun. (R.p. 518, line 8 - p. 519, line 4). Petitioner admitted to handling this weapon the night of the murder. (State's Ex. 58). The State established through DNA testing that Petitioner could not be excluded as a contributor to the DNA found on the victim's gun and pants pocket. (R.p. 447, line 25 – p. 448, line 3; p. 450, lines 17-19).

The State's case against Petitioner was compelling. Even excluding Petitioner's statement to police, the record supports the jury's verdict of murder beyond of reasonable doubt. While Respondent submits the trial court's ruling was not error, any alleged error would be harmless beyond a reasonable doubt.

In sum, Petitioner's May 19, 2013 statement was properly admitted. Petitioner was not in custody at the time of the interview and thus *Miranda* warnings were not needed. However, out of an abundance of caution, investigators properly advised Petitioner of his *Miranda* rights. Under the totality of circumstances, Petitioner's waiver of his *Miranda* rights was voluntarily and knowingly made. Additionally, even if the admission of the statement was to be viewed as error, it would be harmless as there was overwhelming evidence of Petitioner's guilt. Therefore, the trial court did not abuse its discretion in ruling Petitioner's May 19, 2013 statement was admissible. Consequently, this issue is without merit and must be dismissed.

II. The trial court did not abuse its discretion in admitting the DNA analyst's expert testimony regarding two items on which Petitioner could not be excluded as a contributor because the admissible testimony was relevant and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury.

Petitioner contends the trial court erred in admitting the DNA analyst's expert testimony regarding two items of evidence on which Petitioner could not be excluded as a contributor. Specifically, Petitioner asserts the DNA results were of such "weak statistical significance" that the danger of unfair prejudice, confusion of the issues, and misleading the jury outweighed the probative value of the expert's testimony. Not only was the expert testimony relevant, its probative value was not substantially outweighed by the danger of unfair prejudice, confusion, or misleading. The admissible statistical values associated with the two challenged samples were

factors for the jury to weigh and consider. Accordingly, the trial judge did not abuse his discretion in admitting the DNA analyst's expert testimony.

The Court of Appeals reasonably rejected this issue in the following manner in its summary decision, citing *State v. Ramsey*, 345 S.C. 607, 614–15, 550 S.E.2d 294, 298 (2001) (“DNA evidence may be admitted in judicial proceedings in this State in the same manner as other scientific evidence, such as fingerprint analysis and blood tests.”); *State v. Primus*, 349 S.C. 576, 588, 564 S.E.2d 103, 109 (2002) (“[W]hile [a one in 174] probability is not nearly as definitive as that which has been offered in other trials, it is nonetheless highly persuasive, especially when combined with other evidence of [defendant's] guilt.”), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). *State v. Phillips*, No. 2016-000108, 2018 WL 1040306, at *1 (S.C. Ct. App. Feb. 14, 2018). Certiorari must be denied.

Relevant Facts and Proceedings
Motion to Suppress DNA Evidence

Before jury selection, Petitioner made a motion to suppress the DNA evidence found on the victim's clothing and gun. (R.p. 37, line 17-p. 38, line 17). Petitioner argued the evidence was not relevant and improperly shifted the burden of proof from the State to Petitioner. (R.p. 38, lines 9-17). In response, the State argued the DNA evidence was admissible and did not improperly shift the burden of proof. (R.p. 41, line 21 - p. 42, line 3). The State asserted Petitioner would be able to cross-examine the DNA analyst regarding her testing and probability determination. (R.p. 41, lines 24-25; p. 44, lines 3-11, 18-20). The State maintained that while the probabilities were not high, the numbers were still relevant. (R.p. 42, lines 1-3; p. 44, lines 7-11). Additionally, the State argued the probabilities that Petitioner could not be excluded from the DNA mixtures were purely factual issues for the jury to consider and thus would be admissible evidence. (R.p. 41, lines 16-18; p. 44, lines 18-20).

In denying Petitioner's motion to suppress the evidence, the trial judge held the statistical probabilities relating to the DNA samples were factual issues for the jury. (R.p. 43, lines 7-12; p. 44, lines 21-24). Accordingly, the judge found the probabilities went to the weight of the evidence, not its admissibility. *Id.* Also, R.p. 438, line 9, R.p. 442, lines 4-5.

DNA Testimony at Trial

SLED Forensic analyst Lilly Gallman testified at trial as an expert in DNA analysis. (R.p. 436, line 19 – p. 437, line 6) (emphasis added). Gallman testified that she received a number of items of evidence regarding Petitioner's case, which she analyzed, including: swabs from the floor and wall of the victim's home, swabs from the victim's pants pockets, and swabs from the handle of the murder weapon. (R.p. 439, line 1 – p. 440, line 24). Additionally, she received and analyzed known DNA samples from the following people: Shontay McKeithan, Davonte Freeman, Jason Blessing, James Orr, Petitioner, and the victim. (R.p. 445, line 24 – p. 446, line 12). Of particular relevance to the current allegation, Gallman testified she analyzed a swab from the handgun and developed a DNA profile that was a mixture of at least three individuals. (R.p. 446, line 14 – p. 447, line 2). Gallman then explained her next step in the process as follows:

“The next process, once I develop a DNA profile from the evidence and then from the standard, I compare the DNA profile from the standards for the individuals that I had the evidence to, to tell whether this person could be included or excluded from the sample.”

(R.p. 447, lines 15-19). She testified that from the mixture of at least three individuals, Jason Blessing, Petitioner, and the victim could not be excluded as contributors. (R.p. 447, line 24 – p. 448, line 3). Gallman explained the amount of DNA of each individual person in the sample was even, meaning no person was considered a major contributor. (R.p. 448, lines 20-25). In describing the statistic associated with the gun sample, Gallman testified:

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**.

(R.p. 449, lines 4-17) (emphasis added). Gallman testified the individuals that were completely excluded as contributors to the DNA mixture on the gun were: Shontay McKeithan, Davonte Freeman, Kevin Smith, Rhett Long, and James Orr. (R.p. 451, lines 17-19).

Next, Gallman testified about a swab taken from the victim's right front pocket of his blue jeans. (R.p. 450, lines 4-10). Her finding was a mixed sample containing the DNA of at least three individuals, in which Petitioner and the victim could not be excluded as contributors. (R.p. 450, lines 15-19). Gallman testified the probability of randomly selecting an unrelated individual who could have contributed to the mixture was approximately **one in two**. (R.p. 452, line 19 – p. 453, line 1). She testified the individuals that were completely excluded as contributors to the DNA mixture on the pants pocket were: Shontay McKeithan, Davonte Freeman, Kevin Smith, Jason Bless, Rhett Long, and James Orr. (R.p. 452, lines 7-9).

During rigorous cross-examination, Gallman explained her statistics are based on databases that are generated from different populations and she uses the most conservative. (R.p. 455, lines 1-3). When asked about the amount of Petitioner's DNA in the mixture from the gun and how she determined the statistic associated with the mixture, Gallman explained:

“[H]is 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 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.”

(R.p. 460, line 21 – p. 461, line 4)(emphasis added). Gallman then testified her conclusion that there were at least three individuals in the gun mixture was based on the evidence, not in the amount of people that she could exclude as contributors. (R.p. 461, lines 14-19).

On re-direct examination, Gallman testified that the vast majority of Petitioner's numbers matched the sample taken from the right front pants pocket. (R.p. 477, lines 12-16). She expounded, "In order for me to say that someone is not excluded, the vast majority of their information has to be in that sample." (R.p. 478, lines 1-3).

Standard of Review

The decision as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Discussion

Petitioner argues the expert testimony regarding the DNA results should have been excluded under S.C. Rule of Evidence 403. Particularly, Petitioner contends the probative value of the weak statistical DNA results are outweighed by the danger of unfair prejudice, confusion of the issues, and misleading to the jury. However, Respondent submits the testimony was relevant to the issue of Petitioner's guilt and it was not unfairly prejudicial, confusing, or misleading.

DNA evidence may be admitted in judicial proceedings in the same manner as other scientific evidence, such as fingerprint analysis and blood tests. *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990). In order for the evidence to be admissible, the trial judge must find the scientific evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *State v. Ramsey*, 345 S.C. 607, 614, 550 S.E.2d 294, 298 (S.C. 2001). Further, even if the evidence is admissible, the trial judge must determine if its probative value is

outweighed by its prejudicial effect under Rule 403. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

Likewise, population frequency statistics for DNA test results are admissible. *State v. Dinkins*, 319 S.C. 415, 418, 462 S.E.2d 59, 60 (1995). The United States Supreme Court in *McDaniel v. Brown*, 558 U.S. 120 (2010) found that DNA statistical probabilities were powerful pieces of inculpatory evidence for a jury to consider. In that case, the State's evidence at Brown's trial reflected essentially "a **1 in 6,500** chance that one brother would match," while the habeas defense expert whittled the figure to as low as "**1 in 66.**" *Id.* at 132 (emphasis added). The Supreme Court found "[e]ven under [the habeas defense expert's] odds, a rational jury could consider the DNA evidence to be powerful evidence of guilt." *Id.* This Court has found similar DNA statistical probabilities relevant and probative. *State v. Primus*, 349 S.C. 576, 587, 564 S.E.2d 103, 109 (2002) (statistical probability of **1 in 174** "highly persuasive, especially when combined with other evidence of [the defendant's] guilt.").

The statistical nonexclusion probabilities associated with Petitioner's case are certainly relevant and the probative value is not outweighed by any undue prejudicial effect. Not only does the evidence validate the State's theory that Petitioner murdered the victim; it also corroborates the testimony from multiple witnesses that place Petitioner at the scene of the crime. See *Morrow*, 374 F.Supp.2d at 65 (DNA evidence "remains probative, and helps to corroborate other evidence and support the Government's case as to the identity of the relevant perpetrators."). Furthermore, the DNA sample taken from the gun supports Petitioner's own statement that he held the gun on the day the victim was killed. (State's Ex. 58). Moreover, the statistical numbers of **one in two hundred** and **one in two** were not confusing or misleading to the jury because

Gallman adequately explained their significance. (R.p. 449, lines 4-17; p. 455, lines 1-3; p. 460, line 21 – p. 461, line 4). Additionally, Petitioner was given ample opportunity during cross-examination and closing argument to challenge and rebut the DNA evidence. (R.pp. 453-476; 583-608). In fact, Petitioner used cross-examination of Gallman to introduce testimony about DNA that was not attributable to a known standard. From that testimony, Petitioner was able to insinuate that someone other than Petitioner could have committed the murder. *Daubert*, 113 S.Ct. at 2798 (“[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”). Moreover, the jury was adequately informed by the trial judge that an expert’s opinion testimony should be given the weight they see fit. Thus, the statistical numbers associated with the two samples were probative factors to be considered by the jury in weighing all of the evidence and testimony at trial. *See O’Laughlin*, 446 Mass. At 208 (“Evidence is not rendered prejudicial merely because it is inconclusive [and] it is for the jury to determine the probative value to be accorded relevant evidence.”); *Smith*, 978 N.E.2d at 346. Accordingly, the trial judge correctly held the statistical probabilities relating to the DNA samples were factual issues for the jury. (R.p. 43, lines 7-12; p. 44, lines 21-24). Therefore, the trial court did not abuse its discretion in admitting the DNA analyst’s expert testimony regarding two items on which Petitioner could not be excluded as a contributor.

In addition to arguing the testimony should be excluded as unfairly prejudicial, Petitioner asserts the Assistant Solicitor overstated the evidence in her closing argument. As an initial matter, Petitioner’s challenge to the Assistant Solicitor’s closing argument is wholly unpreserved for appellate review. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. *See State v. Walker*, 366 S.C. 643,

660, 623 S.E.2d 122, 130 (Ct.App.2005). Petitioner posed no objections during or after the Assistant Solicitor's closing argument. Therefore, Petitioner's challenge to portions of the closing argument is procedurally barred from review. Regardless, Petitioner's argument is without merit.

Here, the Assistant Solicitor's statements during her closing argument regarding Petitioner's DNA being found on the gun and pants pocket were reasonable inferences from all of the evidence presented at trial. Numerous witnesses placed Petitioner at the scene of the crime within the time frame that the victim was murdered. After the victim was killed, Petitioner was captured on video surveillance carrying a large sum of money that he did not have earlier that day. Moreover, Petitioner himself admitted to being at the victim's house on the incident date. Additionally, Petitioner admitted to holding the victim's gun the day the victim was murdered. Furthermore, Gallman testified the samples from the gun and right front pocket of the victim's pants contained all sixteen numbers from Petitioner's DNA profile. (R.p. 449, lines 12-15; p. 460, line 21; p. 477, lines 12-16). Therefore, when taking the totality of the evidence into consideration, the Assistant Solicitor's remarks were reasonable inferences from the evidence and within the permissible bounds of fair argument.

Additionally, even if the Assistant Solicitor's remarks were to be viewed as improper, there would be no error because the trial judge properly explained the significance of closing arguments to the jury. Before the parties gave their closing arguments, the trial judge instructed the jury that closing arguments should not be considered as evidence. Specifically, the trial judge stated:

“However, this is closing argument and these presentations would be truly argumentative in nature because at this point in time, you have heard all of the evidence and these very fine lawyers will have an opportunity to point to the

evidence that supports their relative positions. What they have to say is not evidence.”

(R.p. 555, line 23 – p. 556, line 3)(emphasis added). Thus, the jury was well aware that the State’s closing argument was not evidence of the case, but rather represented the State’s theory of the case based on reasonable inferences from the evidence introduced at trial.

Harmless Error

Even if this Court were to find an abuse of discretion, any error in admitting the DNA expert testimony was harmless beyond a reasonable doubt because the jury considered substantial corroborating evidence properly admitted at trial. *See State v. Baccus*, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) (harmless error found in admission of DNA evidence). DNA evidence is not generally dispositive in any case; rather, one must look at the whole of the evidence and the particulars of the case. *State v. Jenkins*, 412 S.C. 643, 773 S.E.2d 906 (2015). In the case at hand, the DNA evidence was not crucial to the State’s case in the sense that it was not the only evidence placing Petitioner at the scene and identifying him as the perpetrator. Testimony from Taylor Cowherd, Donte Jenkins, and Wrenshad Anderson placed Petitioner at the crime scene within the timeframe of the murder. (R.p. 271, lines 7-15; p. 273, lines 7-10; p. 280, lines 1-1; p. 292, lines 7-10). The State established Petitioner’s motive through the testimony of Reginald Green by showing that Petitioner was upset with the victim for lying to him about the Playstation video game. (R.p. 250, line 7 – p. 251, line 20). Also, the State was able to establish that Petitioner did not have any money or drugs earlier in the afternoon but possessed money and drugs after the victim was killed. (R.p. 252, lines 3-18; p. 254, lines 4-14; p. 255, lines 8-9; p. 345, line 20 - p. 348 line 14). Investigator McIntosh presented evidence of surveillance footage from a local gas station that showed Petitioner carrying a large sum of money a short time after the victim was killed. (R.p. 345, line 20 - p. 348 line 14). Furthermore,

Petitioner admitted to handling the gun that was used to kill the victim. (State's Ex. 58). Thus, when viewing the record as a whole, the additional DNA evidence Petitioner would have excluded is merely cumulative.

Accordingly, while Respondent submits the trial judge did not abuse his discretion in admitting Gallman's testimony regarding two DNA samples from which Petitioner could not be excluded as a contributor, any alleged error was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, certiorari should be denied and the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

September 24, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

PETITIONER,

Appellate Case No. 2018-000977

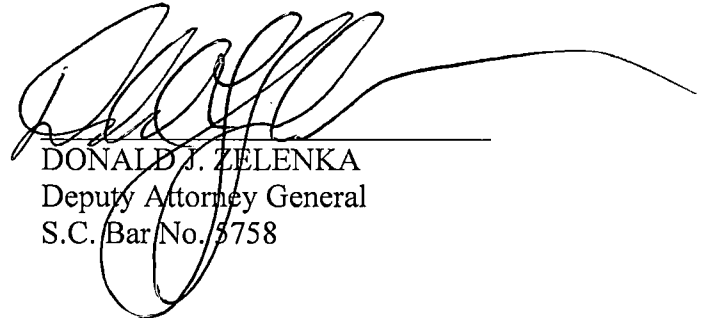
CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Return to the Amended Petition for Writ of Certiorari on Petitioner by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record:

Laura Ruth Baer, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

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

This 24th day of September, 2018.


DONALD J. ZELENSKA
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