STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

PETITIONER

APPELLATE CASE NO 2018-000977

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

ISSUE PRESENTED

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 since 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.

STATEMENT

On September 25, 2014, the Jasper County Grand Jury indicted Petitioner Billy Phillips for the murder of Darius Woods ("Decedent") and possession of a weapon during the commission of a violent crime. R. 650 – 653.

On January 11-14, 2016, Phillips proceeded to trial before the Honorable Michael G. Nettles and a jury. R. 1. Phillips was represented by Steven Plexico, and the State was represented by assistant solicitors Mary Jones and Lenore Masser. R. 1. The jury returned a verdict of guilty. R. 633 – 634. Judge Nettles sentenced Phillips to current terms of forty years for murder and five years for the weapons offense. R. 640.

A timely notice of intent to appeal was served on January 19, 2016, and the direct appeal perfected. In an unpublished opinion the South Carolina Court of Appeals affirmed the convictions and sentence. App. 1. A timely petition for rehearing was filed on March 1, 2018. App. 4. The petition for rehearing was denied by order filed on April 26, 2018. App. 20.

An Amended Petition for Writ of certiorari was filed with this Court on August 7, 2018, and this Court granted the petition on Question II of the petition on November 13, 2018. This Brief of Petitioner follows.

STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429-30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretions where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

- Danger of Unfair Prejudice

The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); see also State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the

comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted));

ARGUMENT

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 since 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.

Introduction

Petitioner and the decedent were friends. R. 99, ll. 8-10. The decedent was known to sell marijuana from his home and carry large amounts of cash. R. 119, ll. 2-7; R. 119, ll. 20-24; R. 259, ll. 1-2; R. 305, ll. 8-25; R. 314, l. 2 – 315, l. 13; R. 320, ll. 14-15. On May 18, 2013, The decedent was shot twice with his own handgun, a .38 special, and died. R. 174, l. 22 – 176, l. 9; R. 518, l. 8 – 519, l. 4; R. 534, ll. 18-25. Despite the fact that petitioner was regularly employed, the prosecution theorized that petitioner murdered the decedent because he needed money and was upset that the decedent lied about petitioner's PlayStation having been stolen, when the decedent still had it at his house. R. 263, l. 8 – 264, l. 6; R. 557, l. 4 – 558, l. 9; R. 572, l. 16 – 575, l. 22.

In its effort to convict petitioner, the state used his involuntary statement and misleading and confusing DNA evidence, which it suggested came from petitioner despite population frequency statistics of only **one in two hundred** and **one in two**. R. 561, ll. 5-13; R. 571, ll. 10-13; R. 575, l. 23 – 576, l. 16; R. 578, ll. 1-8. In addition to pointing out the flaws in evidence and logic in the state's case, the defense argued that the police conducted a poor investigation and blindly focused upon petitioner early on despite other viable suspects. Defense counsel suggested that the murder was committed by an unknown third party whose DNA was left behind on the grip of the decedent's gun and on six swabs taken from various places on the

decedent's blue jeans – possibly Wrenshad Anderson. R. 585, l. 13 – 609, l. 9; see R. 458, l. 8 – 471, l. 5.

This is a novel question of law presented with respect to the issue of the admissibility of DNA evidence. In State v. Dinkins, 319 S.C. 415, 418, 462 S.E.2d 59, 60 (1995), this Court held that DNA population frequency statistics are admissible but cautioned that "as with DNA test results, they are subject to attack for relevancy and prejudice." In Dinkins, the defendant objected to the admission of "the astronomical probability figure of one in 2.9 billion" as unfairly prejudicial "because the jury may have perceived this statistic as infallible." 319 S.C. at 418, 462 S.E.2d at 60. Here, the challenge to the DNA testimony as confusing, misleading, and burden-shifting rested on the fact that the population frequency statistics were so low. R. 37, l. 17 – 44, l. 24; 437 – 478; R. 641, l. 8 – 644, l. 12; R. 654 – 655. Once admitted into evidence, the solicitor did exactly as defense counsel predicted, and misrepresented to the jury that the DNA found actually belonged to petitioner. R. 561, ll. 5-13; R. 571, ll. 10-13; R. 575, l. 23 – 576, l. 16; R. 578, ll. 1-8. This Court should take this opportunity to clarify when a DNA probability is of such low statistical significance that any minimal probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. See Rule 403, SCRE.

Relevant Facts

Despite their repeated accusations, petitioner 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 the decedent worked on fixing his tag light. The decedent had to pick up his roommate, Michelle, because she had some car trouble and was then headed to a party in the Bluffton area at 10:00 p.m. State's Ex. 58 (DVD of petitioner's

5/19/13 Interrogation).[1] Following the Denno[2] hearing, the trial judge ruled that the statements were admissible, finding that petitioners was free to leave and made a knowing waiver of his Miranda[3] rights, though any references to probation, parole, or polygraphs should be redacted. R. 91, l. 14 – 95, l. 17.

It was undisputed that petitioner was in and out of the decedent's home throughout the day on Saturday, April 18, 2013. Reginald Green testified that the day prior, he and petitioner were at the decedent's house playing games on Phillip's PlayStation videogame console. When petitioner had to leave, he left his PlayStation and games behind. Green picked petitioner up from the decedent's house in the late morning or early afternoon on the day of the shooting. He claimed that petitioner was upset because the decedent told him that his PlayStation and games were stolen. Petitioner did not understand why the decedent would "play [him] like that." R. 249, l. 7 – 251, l. 24. Though Green did not represent that petitioner made any threats to the decedent, the State theorized that the PlayStation served as motive for petitioner to kill the decedent. R. 100, l. 2 – 101, l. 21; R. 557, l. 9 – 558, l. 9.

Donte Jenkins did not speak to police until October 6, 2015, over two years after the decedent's death. Jenkins claimed that the decedent's mother, who died prior to petitioner's trial, asked him to wait to come forward while she conducted her own investigation. R. 271, ll. 20-25; R. 273, ll. 7 – 25. Jenkins said that he was at the 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 petitioner walked straight past it. He said that

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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).

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

when he left at approximately 9:15 p.m., the decedent was at the back of his car, working on a tag light with one car door open, and petitioner was still there. R. 265, l. 19 – 271, l. 15.

Taylor Cowherd testified that she stopped by the decedent's house at 9:26 p.m. on the day of the shooting. Though the porch light was out, Cowherd said she knew petitioner from around town and saw him standing on the decedent's porch. She claimed that he responded when she called him by his nickname "Dee." The 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 petitioner was on the porch and the decedent was working on his car. R. 276, l. 1 – 280, l. 4. Cowherd admitted that she was unable to pick petitioner out of a six-person photo array[4] that included petitioner's picture. She excused her failure on the fact that she had only ever seen petitioner wearing glasses and that no one in the photo array was wearing glasses. R. 280, l. 9 – 281, l. 3. Cowherd admitted that she had previously told police that she saw the decedent get in his car and drive away as she was leaving but was unsure if Dee got in the car with him. However, she claimed at trial that the decedent only cranked the car but may have been just checking the tag light. R. 283, l. 6 – 284, l. 21.

According to Shontay "Sunshine" McKeithan, she arrived at the decedent's home at approximately 10:30 p.m. to buy marijuana. She sat outside listening to music and trying to reach the decedent on his cell phone for approximately ten minutes. Davonte Freeman walked up, claiming that he was also there to buy marijuana. They called the decedent's cell phone

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4 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 petitioner and that the state destroyed the array. He also excluded the evidence that Cowherd "identified" petitioner from a single photograph shown to her after the failed photo array. R. 27, l. 18 – 37, l. 10; R. 354, l. 24 – 355, l. 16. He further granted the defense's request for a spoliation charge. R. 548, l. 10 – 549, l. 5.

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. R. 11, l. 16 – 113, l. 19; see also R. 130, l. 13 – 132, 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. R. 112, ll. 11-18; R. 113, ll. 20 – 115, l. 2; R. 122, l. 20 – 125, l. 20.

Freeman can be heard in the background of McKeithan's 911 call giving a false name of "Larry." R. 110, ll. 2-4; R. 116, ll. 18-25; State's Ex. 1 (CD 911 call).[5] Freeman said he lied about his name because he thought there was a warrant for his arrest. R. 128, l. 16 – 129, 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. R. 133, l. 11 – 134, l. 5; R. 136, ll. 12-25; R. 146, ll. 15-19; R. 148, 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. R. 146, l. 23 – 147, l. 9. When Freeman was asked if he and his brother had "each other's back," he responded: "Yes, sir. Always. I'm my brother's keeper." R. 147, ll. 17-19.

Almost two and half years after the decedent's death, on September 29, 2015, Anderson came forward as a witness against petitioner. R. 309, ll. 6-11; R. 303, ll. 8-15. Anderson testified that on the night that the 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

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

petitioner, who "looked like he had something going on" and was fidgeting. He thought petitioner was either reaching for something around his waistline or trying to hide something. Anderson's account of the time when he saw petitioner 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." R. 287, l. 5 – 288, l. 25; R. 291, l. 1 – 295, l. 10; R. 296, ll. 7-20; R. 298, l. 16 – 300, l. 25; R. 302, l. 2 – 303, l. 2; R. 304, ll. 12-24; R. 310, l. 6 – 311, l. 10. Anderson finally admitted: "I don't know what time it was." R. 307, 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. R. 303, ll. 3-15.

Regardless, Anderson put himself in the vicinity of the 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 the 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. R. 175, l. 4 – 179, 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 the decedent's money. R. 296, ll. 24-25; R. 301, l. 21 – 302, l. 1; R. 306, ll. 1-4. Anderson denied being concerned about rumors that his brother killed the decedent. R. 301, ll. 1-5. Officers failed to obtain a buccal swab from Anderson to use for DNA comparison. R. 362, ll. 5-8.

Though he was unsure of the time, Reginald Green, who had picked up petitioner from the decedent's house earlier in the day, got a call from petitioner later that night. Petitioner offered to buy Green five dollars worth of gas if he would come pick him up and take him to the BP station. R. 253, l. 4 – 254, l. 9. Video surveillance showed petitioner buying three beers from

the Taylors BP station at 10:43 p.m. While Investigator McIntosh claimed the footage showed petitioner with "a big wad of cash," such could hardly be determined from the low quality video. R. 347, l. 20 – 348, l. 14; R. 350, l. 20 – 351, l. 11; State's Ex. 54 (DVD of BP surveillance footage). Green admitted that Phillips spent approximately twenty dollars that night but said that petitioner had a regular job at Sea Pines, which could have been the source of his money. He said that petitioner was still upset about his stolen PlayStation and they smoked marijuana that petitioner brought. In total, they spent an hour and a half or so together before Green dropped petitioner off by the Bank of Walterboro before midnight. R. 254, l. 10 – 257, l. 5; R. 262, l. 1 – 263, l. 1; R. 264, ll. 2-6.

Dawn Childers was one of Decedent's girlfriends of approximately three months. The decedent was supposed to come to Beaufort for a pool party on the night that he died. R. 312, l. 18 – 314, l. 1. Childers admitted that she had sent the decedent some "ugly" text messages when she found out that he was seeing other women. R. 318, l. 2 – 319, 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 the decedent. R. 319, l. 25 – 320, 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. R. 37, l. 17 – 40, 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 the decedent, petitioner, 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." R. 40, ll. 5-13. The solicitor confirmed that she was saying that Phillips' DNA was on the weapon. R. 40, ll. 19-22. While

she admitted that the probabilities were "not great," she claimed that was a matter for cross-examination. R. 41, l. 6 – 42, l. 3. Defense counsel argued that the report simply did not say what the solicitor argued. R. 40, ll. 23-25. He pointed to the statistical probabilities in the results attached to petitioner, 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. R. 42, l. 5 – 43, l. 6; R. 43, l. 15 – 44, 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. R. 43, ll. 7-12; R. 44, ll. 21-24.

The state called Lilly Gallman as an expert in DNA analysis. R. 435, l. 6 – 478, l. 6. Gallman had a Bachelor's of Science degree in biology and began working as a forensic DNA analyst at SLED in 1990. R. 435, ll. 9 – 436, 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." R. 436, ll. 16-18; R. 438, ll. 7-9; R. 442, ll. 1-11.

Gallman explained that "everyone's DNA is unique except for identical twins." R. 442, 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." R. 442, l. 22 – 443, 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. R. 443, 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?" R. 449, ll. 18-21 (emphasis added). Gallman responded: "It would be excluded." R. 449, l. 22; see also R. 477, ll. 6-11.

Gallman tested two swabs from the handgun, eight swabs taken from the decedent's jeans, three swabs taken from the wall and flooring of the 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 the decedent's left rear pocket that were insufficient for reliable interpretation. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – R. 471, l. 5; R. 475, l. 5 – R. 476, l. 8. Gallman had known DNA standards from Phillips, Davonte Freeman, Shontay McKeithan, Jason Blessing, and James Orr to use for comparison. R. 437, l. 16 – R. 440, l. 24; R. 445, l. 24 – 446, 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. R. 166, l. 25 – 168, l. 6; R. 234, ll. 10-22.

Petitioner could not be excluded as a contributor on only two of the swabs tested, one from the grip of the handgun and one from the decedent's right front pants pocket. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – 471, l. 5; R. 475, l. 5 – R. 476, l. 8. McKeithan and Freeman were excluded as contributors to those swabs, as were Kevin Smith, Rhett Long, and James Orr.[6] R. 451, ll. 10 – 452, 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. R. 464, l. 13 – R. 471, l. 5. Gallman confirmed that she did not receive a buccal swab for Wrenshad Anderson to test as a standard, though she could have performed such testing

[6] Kevin Smith and Rhett Long appear to be officers with the Ridgeland Police Department. See R. 66, ll. 4-17; R. 150, l. 6 – 151, l. 20. There was no explanation during the trial of who James Orr was or why his buccal swab was submitted for testing.

within one week. R. 476, 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. R. 475, 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, petitioner, and Blessing could not be excluded. R. 446, l. 20 – 448, l. 25. The testing also revealed DNA not attributable to standards – of an unknown person – in the mixture from the handgun swab. R. 462, l. 25 – 463, l. 5. Regarding the statistical significance of the finding related to petitioner, 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.

R. 449, 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 into this room . . . it [is] fair to say that one hundred and ninety-nine of them would be outright excluded." R. 453, 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.**

R. 459, l. 24 – 461, 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. R. 454, l. 9 – 456, l. 6. When asked how many other Americans would match the partial DNA profile obtained the evidence and allegedly "matched" to petitioner, Gallman responded: "I don't know. It's not done like that." R. 462, ll. 8-19. Nevertheless, Gallman agreed that she was not saying that she found petitioner's DNA on the gun, but rather that it could not be excluded because it was a mixture of three people. R. 462, 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." R. 478, 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. The decedent and phillips could not be excluded. R. 450, ll. 4-19; R. 452, 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**." R. 452, l. 22 – 453, l. 1 (emphasis added); R. 453, ll. 13-24; R. 470, l. 6 – 471, 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. R. 470, l. 6 – 471, l. 5.

Defense counsel argued for the exclusion of the DNA evidence[7] with respect to two samples where petitioner 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, petitioner's DNA could not be excluded as a contributor to the mixtures of DNA from the swab of the handgun grip or the swab of the 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.

Despite the low statistical significance and high random match probabilities, the solicitor argued to the jury that petitioner's DNA was found on the gun and the pocket. R. 561, ll. 5-13; R.

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[7] 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).

571, ll. 10-13; R. 575, l. 23 – 576, l. 17; R. 578, 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. R. 641, l. 8 – 644, l. 12. On direct appeal, petitioner raised the following issue:

> **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.**

The Court of Appeals held as follows:

> 2. As to whether the trial court erred in admitting the DNA expert's testimony: *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); *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).

"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 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 the umbrella evidence was inadmissible, 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. R. 449, ll. 1-17; R. 452, l. 22 – 453, l. 1; R. 453, ll. 13-24; R. 470, l. 6 – 471, 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 from the decedent's pants. R. 462, l. 25 – R. 471, l. 5. With respect to the handgun, Gallman testified that she could not exclude the decedent, who owned the gun; Blessing, who admitted to picking the gun up with an inside-out pair or used gloves; or petitioner from the mixture. However, there was also DNA not attributable to any of the standards. R. 446, l. 20 – 448, l. 25; R. 462, l. 25 – 463, 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. R. 460, l. 10 – 462, 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." R. 478, 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.**

R. 561, 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.

R. 571, 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 confusing.** 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.

R. 575, l. 23 – 576, 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.**

R. 578, 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 petitioner's DNA was on the handgun or pocket. R. 462, ll. 20-24. Rather, she could not exclude petitioner's 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.

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 petitioner. He had provided the investigators with an explanation of why his DNA could have been on the decedent's gun but there was no innocent explanation for how his DNA would have gotten on the pocket of the decedent's pants.

Regarding the admission of the DNA evidence, this Court's opinion primarily cited case law regarding the standard review. Additionally, this Court cited the following quote from State v. Primus, 349 S.C. 576, 588, 564 S.E.2d 103, 109 (2002), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005): "[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." Notably, there was no

issue raised in Primus regarding the admissibility of DNA evidence. Rather, the issues before the Supreme Court were related to subject matter jurisdiction and the propriety and harmlessness of the solicitor's comment in his closing argument regarding Primus' failure to present an alibi witness. 349 S.C. at 579, 564 S.E.2d at 104. The Primus Court found that the solicitor's comment was improper. Id. at 584, 564 S.E.2d at 107-08. It was in the harmless error analysis that the Court wrote:

> It is undisputed the victim was attacked and beaten. The question was the identity of the perpetrator. Relying solely on the "de minimus" DNA evidence, the Court of Appeals determined there was not overwhelming evidence that Primus was the assailant.
>
> We conclude there was overwhelming evidence of Primus' guilt. His fingerprint was found on the doorknob of the abandoned home. Two days after the assault, he had scratches on his face and chest which were consistent with the victim's assertion she had scratched Primus on the face and chest with a stick. Finally, the victim's blood was positively identified as being on the wooden stick she used to fend off her attacker; DNA tests determined Primus could have left the blood on the other end of the same wooden stick. According to the serologist, examining the population at random, only 1 of 174 people would match the DNA profile of the blood located on the stick. While this 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 Primus' guilt. Accordingly, the assistant solicitor's comment, while improper, was harmless beyond a reasonable doubt.

Id. at 587-88, 564 S.E.2d at 109. There is no indication that Primus' attorney objected to the admissibility of the serology results, such that this case has little, if any, bearing on the issue before this Court.

In the present case, defense counsel argued for the exclusion of the DNA evidence with respect to two samples where petitioner 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, petitioner's DNA could not be excluded as a contributor to the mixtures of DNA from the swab of the handgun grip or the swab of the 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. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – 471, l. 5; R. 475, l. 5 – R. 476, l. 8.

Again, with the DNA evidence admitted, the solicitor relied heavily upon it in her closing, arguing to the jury that, while Gallman's testimony was "confusing," if petitioner had not touched the decedent's gun and pockets, his DNA would have been excluded. R. 561, ll. 5-13; R. 571, ll. 10-13; R. 575, l. 23 – 576, l. 16; R. 578, ll. 1-8. With the DNA evidence admitted, the solicitor relied heavily upon it in her closing, arguing to the jury: "**Somebody went through both of [Decedent's] 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.**" R. 561, ll. 9-13 (emphasis added). She further argued: "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." R. 571, ll. 10-13 (emphasis added). On the contrary, the expert explicitly testified that she could not say that petitioner's DNA was on the handgun or pocket. R. 462, ll. 20-24. Rather, she could not exclude petitioner from the DNA mixtures on two of the swabs and provided random match probability statistics, which in this case were extraordinarily low. Notably, however, the solicitor made no mention of the statistics.

Though investigators did not request a buccal swab from petitioner initially, they obtained one several months later. R. 234, ll. 18-23. Of the swabs submitted for DNA testing, petitioner 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 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. R. 445, l. 15 – 476, l. 8.

The defense argued that the DNA evidence should be excluded pursuant to Rule 403, SCRE, and because it would result in improper burden shifting. R. 37, l. 17 – 40, l. 2; R. 42, l. 5 – 43, l. 6; R. 43, ll. 15-25; R. 44, l. 12-17; R. 654 (Motion to Exclude DNA evidence). The solicitor argued that while it was "not a great probability," that was a matter for cross-examination. R. 40, l. 5 – 42, l. 3; R. 44, ll. 1-11; R. 44, ll. 18-20. The trial judge ruled that it went to weight rather admissibility and denied the motion to exclude the DNA evidence. R. 43, ll. 7-12; R. 44, ll. 21-24. Defense counsel did not object to SLED analyst Lilly Gallman's expert qualification, but he renewed his objection to the admissibility of the DNA evidence. R. 436, ll. 16-18; R. 438, ll. 7-9; R. 442, ll. 1-11.

Gallman tested two swabs from the handgun, eight swabs taken from the decedent's jeans, three swabs taken from the wall and flooring of the decedent's living room, and three swabs taken from the crime scene – two from socks and one from a piece of jewelry. All of the swabs were compared to known DNA standards, with the exception of one swab from the handgun and one swab from the decedent's left rear pocket that were insufficient for reliable interpretation. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – R. 471, l. 5; R. 475, l. 5 – R.

476, l. 8. Gallman had known DNA standards from Phillips, Davonte Freeman (brother of Wrenshad Anderson who "found" the body), Shontay McKeithan, Jason Blessing, Kevin Smith, Rhett Long, James Orr to use for comparison.[8] R. 437, l. 16 – R. 440, l. 15; R. 442, l. 17 – 447, l. 19; R. 452, ll. 1-6.

Petitioner could not be excluded as a contributor on only two of the swabs tested, one from the grip of the handgun and one from the decedent's right front pants pocket. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – 471, l. 5; R. 475, l. 5 – R. 476, l. 8. The DNA profile obtained from the swab of the handgun revealed a mixture of at least three individuals – the decedent, petitioner, and Blessing could not be excluded. R. 446, l. 20 – 448, l. 25; R. 462, ll. 20-24. Regarding the statistical significance of the finding related to petitioner, Gallman 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.

R. 449, ll. 1-17 (emphasis added); see also R. 478, ll. 1-3.

The DNA profile obtained from the swab of the decedent's right front pocket also revealed a mixture of at least three individuals – the Decedent and petitioner could not be excluded. R. 450, ll. 4-19; R. 452, 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

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[8] 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. R. 166, l. 25 – 168, l. 6; R. 234, ll. 10-22. Kevin Smith and Rhett Long also appear to be officers with the Ridgeland Police Department. See R. 66, ll. 4-17; R. 150, l. 6 – 151, l. 20. There was no explanation during the trial of who James Orr was or why his buccal swab was submitted for testing.

who could have contributed to this mixture is approximately **one in two**." R. 452, l. 22 – 453, l. 1 (emphasis added); R. 453, ll. 13-24; R. 470, l. 6 – 471, l. 5.

Notably, the DNA reports on one of the swabs taken from the handgun and on six of the eight swabs from the decedent's pants pockets, including the right front pocket, found DNA not attributable to the standards tested, i.e. of an unidentified person. R. 462, l. 25 – 463, l. 5; R. 464, l. 13 – R. 471, l. 5. Gallman confirmed that she did not receive a buccal swab for Wrenshad Anderson to test as a standard, though she could have performed such testing within one week. R. 476, 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. R. 475, ll. 21-24.

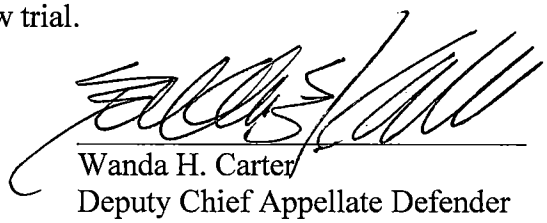
Again, despite the low statistical significance and high random match probabilities, the solicitor argued to the jury that petitioner's DNA was found on the gun and the pocket. R. 561, ll. 5-13; R. 571, ll. 10-13; R. 575, l. 23 – 576, l. 17; R. 578, ll. 1-8. The trial judge gave serious consideration to defense counsel's motion for new trial. The parties disputed whether the solicitor's arguments were based on the DNA analyst's actual testimony or the solicitor's "interpretation." While the trial judge characterized the expert's testimony as "logically inconsistent," he ultimately denied the motion. R. 641, l. 8 – 644, l. 12.

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 – he touched it while visiting Decedent earlier in the day –

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, counsel for petitioner respectfully requests that this Court reverse petitioner's convictions and remand for a new trial.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner 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 Brief of Petitioner has been served on Billy Phillips, #366757, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 2nd day of January, 2019.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of January, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.