

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

S.C. SUPREME COURT

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

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

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THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

PETITIONER,

Appellate Case No. 2018-000977

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**BRIEF OF RESPONDENT ON CERTIORARI**

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## **PETITIONER'S QUESTION PRESENTED**

- 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 COUNTER-QUESTIONS PRESENTED**

- I. Whether the trial court abused its discretion in admitting the DNA analyst's expert testimony regarding two items on which Petitioner could not be excluded as a contributor where 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?
- II. Whether the admission of evidence of DNA random match probabilities for two items, if inadmissible, was harmless error in light of the cumulative evidence that the Petitioner admitted in a statement touching the handgun, evidence that Petitioner was at the scene and evidence of a motive being present for the murder?

## RESPONDENT'S STATEMENT OF THE CASE

A Jasper County Grand Jury indicted Petitioner, Billy Phillips, in September 2014 for the murder of Darius Woods (Indictment Number 2014-GS-27-0312) and in January 2015 for possession of a weapon during the commission of a violent crime (Indictment Number 2014-GS-27-0602).

On January 11, 2016, Petitioner's case was called to trial before the Honorable Michael G. Nettles. (R.p. 1). Steven Plexico, Esquire, represented Petitioner during the trial. (R.p. 1). Assistant Solicitors Mary C. Jones and Lenore Masser represented the State. (R.p. 1). On January 14, 2016, the jury returned verdicts of guilty on both charges. (R.p. 634, lines 2-11). Judge Nettles sentenced Petitioner to incarceration for forty (40) years on the murder conviction and to incarceration for five (5) years on the weapons conviction. (R.p. 640, lines 8-22). The sentences were set to run concurrently. (R.p. 640, lines 8-22).

Petitioner filed a timely notice of appeal. (Notice of Appeal). In an unpublished opinion the South Carolina Court of Appeals affirmed the convictions and sentence. App. 1. *State v. Phillips*, No. 2016-000108, 2018 WL 1040306, at \*1 (S.C. Ct. App. Feb. 14, 2018). 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.

In the Petition, the Petitioner raised the following questions presented:

I. Whether the Court of Appeals erred in finding that the trial court did not err in admitting Petitioner'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?

II. 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?

The Respondent made a Return to the Petition on September 24, 2018.

The Court granted the petition on Question II of the petition on November 13, 2018. This briefing follows.

## RESPONDENT'S STATEMENT OF FACTS

On the evening of May 18, 2013, the victim, Darius Woods<sup>1</sup>, was shot to death by his own gun at his home in Ridgeland, South Carolina. The State presented evidence at trial that Petitioner<sup>2</sup>, Billy Phillips, murdered the victim in order to obtain money, drugs, and a PlayStation video game.

Earlier that day, Reginald Green, a good friend of Petitioner, was driving to a job interview when he saw Petitioner on the victim's porch. (R.p. 248, lines 15-18; p. 249, lines 9-12). When Reginald pulled over to greet the two men, Petitioner asked Reginald for a ride to the gas station. (R.p. 248, line 14- p. 249, line 20). While the two men were in the car, Petitioner told Reginald that his PlayStation video game had been stolen from the victim's house. (R.p. 250, lines 7-14). Petitioner explained that the victim had told him that his house was burglarized and the only thing that was stolen was the PlayStation that Petitioner had taken to the victim's house the day before. (R.p. 250, line 7 – p. 251, line 6). Visibly upset and angry at the victim, Petitioner exclaimed, "I can't believe he tried to play me like that." (R.p. 251, lines 19-20). Reginald dropped Petitioner off at a gas station and did not hear from Petitioner until later that night. (R.p. 252, line 21- p. 253, line 16). Between 10:00 to 10:30 p.m., Petitioner called Reginald and offered to pay for gas if Reginald would take him to the gas station. (R.p. 253, lines 7-25). Reginald testified at trial that neither he nor Petitioner had any money or marijuana earlier that day when they were together. (R.p. 252, lines 3-18; p. 254, lines 4-14). After picking up

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<sup>1</sup> Throughout the trial testimony and Petitioner's interviews, the victim is frequently referred to by his nickname "Ace". (R.p. 89, 99, 249-255, 264, 312, 358-59; State's Exhibit 58).

<sup>2</sup> Throughout the trial testimony and Petitioner's interviews, Petitioner is frequently referred to by his nickname "Dee". (R.p. 32-35, 52; 247-253, 277-283, 276-295, 333, 357; State's Exhibit 58).

Petitioner, the two men went to a gas station where Petitioner paid for Reginald's gas and some cigars and beer. (R.p. 254, line 20- p. 255, line 4). They went back to Reginald's house and smoked marijuana that Petitioner had provided. (R.p. 255, lines 8-9). Petitioner then began talking about his PlayStation again. (R.p. 255, lines 5-19). Reginald testified that Petitioner was very upset and Petitioner thought the victim's story was "BS". (R.p. 255, lines 8-19). Around midnight, Reginald dropped Petitioner off at the Bank of Walterboro. (R.p. 256, lines 1-4). Reginald testified that Petitioner was going to walk from the bank to a house across the street from where the victim lived. (R.p. 256, lines 5-9; p. 259, lines 3-11).

Donte Jenkins testified he went to the victim's house around dusk that evening. (R.p. 265, lines 21-25). Donte observed that a PlayStation was hooked up to a TV in the victim's den. (R.p. 266, line 16 – p. 267, line 1). Between twenty minutes to an hour later, Petitioner came to the victim's front door. (R.p. 267, lines 21-23). Donte let Petitioner inside the home and the two men walked through the den into the kitchen. (R.p. 268, line 1; p. 269, lines 16-25). Donte, Petitioner, and the victim talked for a while in the kitchen and then decided to go outside so the victim could fix the tag light on his car. (R.p. 268, line 23 – p. 269, line 3; p. 270, lines 8-23). Donte left 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).

Taylor Cowherd testified she called the victim at 9:25 p.m. as she was driving to his house that night. (R.p. 276, lines 8-14). When she arrived, she saw Petitioner, dressed in a dark t-shirt, standing on the victim's front porch. (R.p. 277, lines 3-4; p. 278, lines 18-20). Cowherd said to Petitioner, "Hey what's up Dee. Is Darius inside?" (R.p. 278, lines 9-10). Petitioner responded that he was inside and would be right out. (R.p. 278, line 10). The victim came outside and spoke to Taylor for a few minutes while he worked on his car. (R.p. 279, lines 9-22).

Taylor left the house a few minutes later, leaving behind the victim working on his car and Pétitioner standing on the front porch. (R.p. 279, line 23 – p. 280, line 4).

Wrenshad Anderson testified that he saw Petitioner, wearing a blue polo shirt, walking away from the direction of the victim's home sometime after 9:40 p.m. (R.p. 294, line 24- p. 295, line 10). He described Petitioner's demeanor as fidgety, as if he was trying to hide something. (R.p. 292, lines 7-10).

Sometime after 10:00 p.m., Shontay McKeithan arrived at the victim's home to purchase marijuana. (R.p. 112, line 4; p. 113, lines 7-11). While sitting in her car, she called the victim's phone but he did not answer. (R.p. 111, lines 24-25). About ten minutes later, Davonte Freeman arrived at the victim's home to buy marijuana. (R.p. 112, lines 2-4; p. 113, lines 5-6; p. 131, lines 4-5). Shontay told Davonte that the victim was not answering his phone. (R.p. 112, lines 5-6). Davonte proceeded to call the victim while Shontay got out of her car and walked to the front door of the house. (R.p. 112, lines 7-8). As she stood in front of the door, she heard the victim's cellphone ringing. (R.p. 112, line 9). They also observed that the victim's car doors were open with the lights turned on. (R.p. 131, lines 15-22). The two became concerned so Davonte walked to the side door and entered the victim's house. (R.p. 112, lines 11-12; p. 113 lines 20-25; p. 132, lines 14-23). Davonte testified that upon entering the house he saw the deceased victim on the floor. (R.p. 133, lines 13-24). He testified the victim was lying on his back with his gun on his stomach and his pants pockets inside out. (R.p. 133, lines 21-22; p. 135, lines 18-23). Davonte became panic-stricken and picked up the gun. (R.p. 136, lines 14-18). Davonte testified that he put the gun back exactly where he found it on the victim. (R.p. 148, lines 11-19). After looking around the house to see if anyone else was inside, Davonte ran outside and told Shontay to call the police. (R.p. 137, lines 17-23). Shontay then called 911. (R.p. 114, line 25). Shontay

testified that in the time Devonte entered and left the house she did not hear any gun shots, only the sound of the victim's phone ringing. (R.p. 114, lines 4-10).

Officers with the Ridgeland Police Department and Jasper County Sheriff's Office responded to the victim's house and began processing the crime scene. (R.p. 154, lines 10-25). Officer Jason Blessing retrieved the gun off the victim's stomach and secured it in his patrol vehicle. (R.p. 157, lines 19-21; p. 166, line 21 – p. 167, line 18). The victim's gun was then sent to the South Carolina Law Enforcement Division (SLED) for processing. (R.p. 157, line 24 – p. 158, line 7). During the search of the victim's home, officers did not find any money, marijuana, or the PlayStation. (R.p. 367, lines 14-20). However, at trial, multiple witnesses testified that the victim sold marijuana out of his house. (R.p. 119, lines 5-7; p. 142, lines 3-5; p. 261, lines 6-11; p. 273, lines 3-6; p. 314, lines 2-4). Furthermore, the victim's girlfriend testified that the victim often would carry approximately eight hundred dollars in his pants pocket. (R.p. 215, lines 2-13).

During the investigation, Investigator Chris McIntosh, with the Ridgeland Police Department, obtained video surveillance from the gas station where Petitioner and Reginald had purchased the gas, cigars, and beer. (R.p. 343, line 11 – p. 344 line 17). The video depicted Petitioner entering the gas station at 10:43 p.m. and pulling out from his pocket a "pretty big fold of cash" to pay for his items. (R.p. 345, line 20 - p. 348 line 14). Additionally, Investigator McIntosh conducted a search of Petitioner's home and located a dark blue polo shirt that matched the description of the shirt Petitioner was wearing earlier in the night. (R.p. 362, lines 15-19).

Dr. Nicholas Batalis, an expert in forensic pathology, performed the autopsy on the victim on May 21, 2013. (R.p. 523, line 20 - p. 524, line 6). Dr. Batalis testified that the victim had been shot twice, once in the neck and once in the back of the head. (R.p. 525, lines 12-14).

The wound to the head was a contact shot, meaning that the gun was pressed up against the skin at the time of firing. (R.p. 533, line 18 – p. 534, line 17). Dr. Batalis testified he was able to recover a bullet and jacket from the gunshot wound to the head. (R.p. 532, lines 10-11). Dr. Batalis concluded that the cause of death was two gunshot wounds and the manner of death was homicide. (R.p. 534, line 18-25).

Michelle Eichenmiller, a firearms expert at SLED, compared the victim's Ruger .38 special revolver to the projectiles recovered from the autopsy. (R.p. 513, line 4 - p. 517, line 25). Eichenmiller testified she was able to determine that the projectiles recovered from the autopsy were indeed fired from the victim's gun. (R.p. 518, line 8 - p. 519, line 4).

Lilly Gallman, a forensic analyst at SLED, performed the DNA analysis of several of items taken from the crime scene and autopsy. (R.p. 435-453). Gallman testified the swab from the victim's gun resulted in a mixed profile containing the DNA of at least three individuals. (R.p. 446, line 23 – p. 447, line 2). Gallman explained that Petitioner, Officer Jason Blessing, and the victim could not be excluded as contributors to the mixed DNA sample. (R.p. 447, line 24 – p. 448, line 3). She testified the statistical probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two hundred. (R.p. 449, lines 9-2). Gallman then testified the swab taken from the right front pocket of the victim's blue jeans resulted in a mixed profile of at least three individuals. (R.p. 450, lines 4-17). She expounded the victim and Petitioner could not be excluded as contributors to the mixed DNA sample. (R.p. 450, lines 17-19). Gallman then testified the statistical probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two. (R.p. 452, line 19 – p. 453, line 1).

Investigators interviewed Petitioner twice—and he gave two vastly different stories. Following a thorough *Jackson v. Denno*<sup>3</sup> hearing, both of the Petitioner's statements were introduced to the jury at trial. (R.p. 45-53, 55-96). The recorded May 19, 2013 interview was admitted into evidence and played for the jury. (R.p. 373, lines 13-24; State's Exhibit 58). The May 24, 2013 interview was testified to by Officer John Burnett. (R.p. 382-392). During his first statement, Petitioner denied being at the victim's house when he was killed. (State's Exhibit 58). In his second statement, Petitioner told officers that he was outside in the victim's car when three unknown men went inside the victim's home and killed him. (R.p. 388, line 20 – p. 391, line 5).

### 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). 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).

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<sup>3</sup> *Jackson v. Denno*, 378 U.S. 368 (1964)

## ARGUMENT

- I. **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. Any error in the admission was harmless error.**

Relevant testimony concerning DNA analysis of the victim's front right pocket of his blue jeans and the handgun that could not eliminate the Petitioner as a contributor was properly admitted at trial after a suppression hearing. 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. 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). The conviction must be affirmed.

### **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 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, 11. 5-13. The solicitor confirmed that she was saying that Phillips' DNA was on the weapon. R. 40, 11. 19-22. 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).

Defense counsel argued that the report simply did not say what the solicitor argued. R. 40, 11. 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, 1. 5 - 43, 1.6; R. 43, 1. 15 - 44, 1. 17.

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.

### *The 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).<sup>4</sup> Gallman testified that she received a number of items of evidence regarding Petitioner's case, which she analyzed. These included: 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). She also analyzed known DNA samples from the following people: Shontay McKeithan, Davonte Freeman, Deputy Jason Blessing, James Orr, Petitioner, and the victim. (R.p. 445, line 24 – p. 446, line 12).

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<sup>4</sup> 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, 11. 16-18; R. 438, 11. 7-9; R. 442, 11. 1-11.

### *The Handgun DNA Sample*

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.<sup>5</sup>

(R.p. 446, line 14 – p. 447, line 2). Gallman then explained her next step in the process:

“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

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<sup>5</sup> In cases of mixed DNA samples, the DNA Advisory Board<sup>4</sup> has endorsed two methods for calculating statistical ratios: (1) the combined probability of inclusion (or its reverse, the combined probability of exclusion) calculation; or (2) the likelihood ratio calculation. DNA Advisory Board, *Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA Profiles Calculated from Pertinent Population Database(s)*, 2 Forensic Sci. Comm. No. 3, ¶ 21 (2000) (DNA Advisory Board).

A “probability of inclusion” is the probability that an unrelated person randomly chosen from the population is included as a potential contributor of the mixed DNA profile. The probability of inclusion statistic provides an estimate of the portion of the population that has a genotype composed of at least one allele<sup>5</sup> observed in the mixed profile. John M. Butler, *Advanced Topics in Forensic DNA Typing: Interpretation* 320 (1st ed. 2014). The “random man not excluded” approach uses the combined probability of inclusion where all possible genotypes are given \*\*113 \*167 equal weight. *Id.* A single “probability of inclusion” calculation “involves summing all of the observed alleles at a locus and then squaring this value to obtain the combination of all possible genotypes.” *Id.* at 314.

A likelihood ratio “compares an evidence match relative to coincidence. It is the statistic reflecting the relative probability of a particular finding under alternative theories about its origin.” William C. Thompson, Laurence D. Mueller, & Dan E. Krane, *Forensic DNA Statistics: Still Controversial in Some Cases*, *The Champion* (Dec. 2012). Its calculation estimates how much more likely it is that the suspect is the source of the evidence than it is that the evidence originated from a randomly selected member of the population unrelated to the suspect. *National Research Council, Committee on DNA Forensic Science, supra* at 127–28. Under the likelihood ratio approach, “[t]wo competing hypotheses are set up: the hypothesis of the prosecution \* \* \*, which is that the defendant committed the crime, and the hypothesis of the defense \* \* \*, that some unknown individual committed the crime.” John M. Butler, *Advanced Topics in Forensic DNA Typing: Interpretation*, 322 (1st ed. 2014). The likelihood ratio is then the probability of the evidence given the prosecution's hypothesis over the probability of the evidence given the defense's hypothesis. *Id.* That is, it is the ratio between the likelihood that a given profile came from a particular individual and the likelihood that it came from a random unrelated person. U.S. Department of Justice, *DNA for the Defense Bar* 17 (June 2012).

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 at least three individuals, Deputy Jason Blessing,<sup>6</sup> the 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, which meant 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). 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, 11. 2-7.

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<sup>6</sup> 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, 1. 25 - 168, 1. 6; R. 234, 11. 10-22.

### *The Victim's Front Right Pocket*

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).

### *The Cross-examination*

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).

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, 1. 9 - 456, 1. 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, 11. 8-19. Nevertheless, Gallman agreed that she was not saying that she found petitioner's DNA on the handgun, but rather that it could not be excluded because it was a mixture of three people. R. 462, 11. 20-24.

#### *Re-Direct Examination*

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).

#### **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 allegedly 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."). Also *Commonwealth v. O'Laughlin*, 446 Mass. 188, 843 N.E.2d 617, 633 (2006) (rejecting defendant's challenge to the admissibility of DNA evidence that "only demonstrated that the likelihood that any individual contributed to the mixture of DNA was **one in two**" and concluding that "[t]he probative value of the evidence is for the jury to decide").

In *State v. Taylor*, 76 A.3d 791 (Del.2013), the Court upheld the Superior Court's decision to admit DNA evidence. A DNA sample was recovered from a weapon at issue in the case. The results of testing of that evidence provided that the defendant's DNA profile "could not be excluded." In *Taylor*, less than a full DNA profile was available and because of the limited sample it was possible that defendant never touched the weapon, with the caveat that he could not be excluded as a contributor. Furthermore, in *Taylor*, a statistical number establishing a

statistical significance “could not be provided and that theoretically the entire American male population could be a DNA contributor.” In the underlying evidentiary context of that case, the Delaware Supreme Court held that the trial court did not abuse its discretion in admitting the DNA test results for two reasons. First, the testing established that four different people handled the gun. That information made more likely the conclusion that the defendant, a member of a gang, shared the weapon and that the gang consisted of three or more people: Second, the Court held that “the fact that [defendant] could not be excluded had some probative value because other suspects were excluded, and [defendant] was not.” Therefore, the DNA evidence was appropriately admitted into evidence, despite the weak statistical evidence associated with the DNA results.

In *United States v. Morrow*, 374 F.Supp.2d 51 (D.D.C.2005), the court discussed at length the issue of the admissibility of DNA evidence with a low statistical significance. 374 F.Supp.2d at 63-66. Again, the DNA evidence was to be used to establish the identity of the person who committed the offense, a series of armed robberies. The DNA evidence had a “relatively low level of statistical significance, ranging from a 1:12 probability of selecting an unrelated individual in the relevant population to a 1:1 probability of selecting an unrelated individual.” *Id.*, at 62. After a lengthy discussion, the court concluded that a jury would understand the low significance and would not be misled, and the evidence admittedly had some probative value. *Id.*, at 65.

A Vermont court upheld admission of a 1 in 12 match probability for mitochondrial DNA evidence. *State v. Brochu*, 183 Vt. 269, 949 A.2d 1035, 1048-49 (2008). The court upheld the trial court's determination that, although this relatively high statistic had limited probative value, it was not substantially outweighed by prejudicial effect. *Id.* The trial court had properly

observed that the defendant could challenge the weight of this evidence, and demonstrate its limited probative value, through cross-examination and presentation of contrary expert witnesses. *Id.*<sup>7</sup>

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<sup>7</sup> A common mistake in attempting to understand the varying DNA statistical probability calculations is to conflate either a probability of inclusion/exclusion, or a random match probability, with the probability (or likelihood ratio) that a particular defendant is or is not the source of the DNA. This mistaken assumption is referred to as the “prosecutor’s fallacy,” which “is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample.” *McDaniel v. Brown*, 558 U.S. 120, 128, 130 S.Ct. 665, 175 L.Ed.2d 582 (2010) (quoting *National Research Council, Committee on DNA Forensic Science, The Evaluation of Forensic DNA Evidence* 133 (1996)). Alternatively, it is called the “fallacy of the transposed conditional.” Brief of 20 Scholars of Forensic Evidence as Amici Curiae in Support of Respondent, *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 175 L.Ed.2d 582 (2010). “In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random-match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor’s fallacy.” *McDaniel*, 558 U.S. at 128, 130 S.Ct. 665. “This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a 0.01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.” *Id.* This is an important distinction to make, and yet it is a distinction that has not been clearly explained in our jurisprudence in Illinois. This same error can occur with the use of the probability of inclusion or probability of exclusion, which can be confused with source probability.

The prosecutor’s fallacy is “the incorrect belief that the chance of a rare event happening is the same as the chance that the defendant is innocent.” Helen Joyce, *Beyond Reasonable Doubt*, *Plus Magazine* (Aug. 31, 2002) <https://plus.maths.org/content/beyond-reasonable-doubt>. “For instance, most United States senators are men, but very few men are senators. Consequently, there is a high probability that an individual who is a senator is a man, but the probability that an individual who is a man is a senator is practically zero.” Federal Judicial Center, *supra* at 131 n. 167. “The obvious but absolutely wrong thing to do is to say: ‘The rarity of this profile is 1 in 2 million. So there’s only a 1 in 2 million chance that it came from someone other than the suspect ... We’ve got him!’ ” *Philip Dawid & Rachel Thomas, It’s a match!*, + *Plus Magazine* (July 12, 2010), <https://plus.maths.org/content/os/issue55/features/dnacourt/index>. This is the prosecutor’s fallacy—“misinterpreting the match probability (the probability that a random person’s profile matches the crime sample) as the probability this particular person is innocent on the basis of the evidence.” *Id.*

Compare the following variations on the same numbers. Assume that the correct statement is: The chance is 1 in 7000 that some particular person other than the suspect would leave a stain like the actual stain (random match probability). Now turn it around for the

In *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1274–75 (D.N.M. 2013), the District Court made a reasonable statement concerning low random match probabilities. The Court stated:

The Court is persuaded by the approach of the cases that liberally allow admission of DNA evidence of relatively low statistical significance. These cases properly acknowledge the liberal standard of admission under Daubert and the Federal Rules, and the general presumption in favor of admission of “shaky evidence” with the danger of undue weight being countered by vigorous cross-examination, presentation of contrary expert witnesses, and the possibility of jury instructions to explain the issues. The Court recognizes that the 1 in 12 statistic is relatively high. But the Court finds that the probative values of these three pieces of DNA evidence are not substantially outweighed by any prejudicial effects. The Court anticipates that there will be much education of the jury on statistical issues, and much other evidence and cross-examination which will allow the jury to properly assess the DNA evidence and which will prevent the jury's placing undue weight on the statistical significance.

In making this decision, the Court is influenced by the decreased possibility of prejudice when the jury compares these high statistical probabilities with the very low random match probabilities of other items of evidence. **The court in *Morrow* observed that the low statistical significance “actually benefits” the defendants, allowing them to argue that “hundreds, if not thousands, of others in the Washington, D.C. area cannot be excluded as possible contributors as well”; this line of attack would allow the defendants to significantly reduce any prejudice. *Morrow*, 374 F.Supp.2d at 65. The National Research Council recognized this point. In NRC II, this was described as the “defendant's fallacy”; research indicates that jurors may dismiss or undervalue DNA matches with high likelihood ratios “because other matches are to be expected in unrealistically large populations of potential suspects.” NRC II, pp. 198; see *id.* at 133 (“The ‘defendant's fallacy’ is to assume that in a given population, anyone with the same profile as the evidence sample is as likely to have left the sample as the suspect.”).**

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prosecutor's fallacy: The chance is 1 in 7000 that someone, anyone, other than the suspect left the stain. Then consider how often the same facts are carelessly paraphrased: The chance is 1 in 7000 for someone other than the suspect to produce the observed evidence.

It is a fallacy because it falsely equates that the probability that the suspect might be the donor (source probability) can be computed from the DNA evidence alone, which implies illogically that other evidence in the case makes no difference at all. See Charles H. Brenner, Ph. D., *Forensic mathematics of DNA matching*, <http://dna-view.com/profile.htm>.

*United States v. McCluskey*, 954 F. Supp. 2d 1224, 1274-75 (D.N.M. 2013). Finding decisions such as *Morrow* and *Graves* persuasive, the federal district court held admissible nonexclusion DNA matches with random match probabilities of 1:9268, 1:21, and 1:12. *Id.* at 1273, 1275. Other cases have found that DNA evidence can be admitted to show only that the defendant cannot be excluded as the source of the DNA. *See United States v. Cuff*, 37 F. Supp. 2d 279, 282 (S.D.N.Y. 1999).<sup>8</sup>

The statistical nonexclusion probabilities associated with Petitioner's case are certainly relevant and the probative value is not outweighed by any undue prejudicial effect. The Petitioner's Rule 403 argument must fail. 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).

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<sup>8</sup> Expert testimony of a 'high statistical probability' in matching DNA is much the same. That the DNA match may not be absolute goes to the weight and credibility of the evidence." *Hampton v. State*, 961 N.E.2d 480, 493 (Ind.2012); see also *State v. Lang*, 129 Ohio St.3d 512, 954 N.E.2d 596, 616–17 (2011) (recognizing that expert testimony that "1 of 3,461 people could possibly be included as a potential source of the DNA" and that "the statistic has to be more than 1 in 280 billion to say to a reasonable degree of scientific certainty [that] this person is a source" "weakened the certainty of the DNA evidence," but concluding that "the jury remained free to assign this evidence whatever weight it deemed proper in arriving at the verdict") (internal quotation marks omitted); *Commonwealth v. Crews*, 536 Pa. 508, 640 A.2d 395, 403 (1994) ("[T]he relevant, though inconclusive, DNA evidence was admissible in this case; its weight and persuasiveness were properly matters for the jury to determine.").

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.<sup>9</sup> From that testimony, Petitioner was able to insinuate that

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<sup>9</sup> The Petitioner asserts in the brief the following cross-examination of Agent Gallman regarding the statistics generated from the handgun swab. Respondent submits that it supports that it goes to the weight and not the admissibility. These questions were made before the jury and are interesting since the Petitioner admitted in his statement that he had touched the gun before:

MR PLEXICO: And the results from the other tests, #1.1 says could be Darius Woods', could be Jason Blessing's, could be Billy Phillips. But that's from the small set of six or seven that you tested. Correct? To get your results? . . .It could be the owner's [Darius Woods] DNA that you were looking at because he couldn't be excluded? . . .

MS. GALLMAN: That's right. He could not be excluded.

MR. PLEXICO: . . . Now being excluded --because you can't be excluded doesn't mean you can be included, particularly does it?

MS. GALLMAN: His DNA profile was included in the mixture. If he was excluded then he would be on the list of excluded individuals.

MR. PLEXICO: But you only had a partial DNA profile that matched his [Darius Woods - the owners] 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

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.

#### **The Unpreserved Issue About the Solicitor’s Argument**

In addition to arguing the DNA statistical 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.

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put them out. I can only use — 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, 1. 24 - 461, 1. 4.

*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.

In *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975), our Supreme Court set forth the parameters of permissible prosecutorial argument:

In 23A C.J.S. Criminal Law § 1107, closing arguments, similar to that of the solicitor in this case, are discussed as follows:

"So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider."

*Durden*, 264 S.C. at 92, 212 S.E.2d at 590.

If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. *Id.* Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony. *See State v. Raffaldi*, 318 S.C. 110, 456 S.E.2d 390 (1995); *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976). On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice. *See Durden, supra*; *State v. White*, 246 S.C. 502, 144 S.E.2d 481 (1965).

The Petitioner, for the first time in the appeal, complained about the following areas of the unobjected argument:

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, 11. 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, 11. 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, 1. 23 - 576, 1. 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, 11. 1-8 (emphasis added).

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

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. 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).

First, the Petitioner admitted to handling the gun that was used to kill the victim. (State's Ex. 58). The DNA evidence concerning the gun therefore may be viewed as cumulative.

Second, other evidence placed the Petitioner at the crime scene. 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). 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 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 through Green that Petitioner did not have any money or drugs earlier in the afternoon but possessed money and

marijuana after the victim was murdered. (R.p. 252, lines 3-18; p. 254, lines 4-14; 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).

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).

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.

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

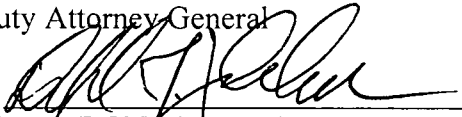
For all of the foregoing reasons, the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

BY:

  
DONALD J. ZELENKA  
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ATTORNEY FOR RESPONDENT

February 21, 2019

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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

PETITIONER,

Appellate Case No. 2018-000977

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**CERTIFICATE OF SERVICE**

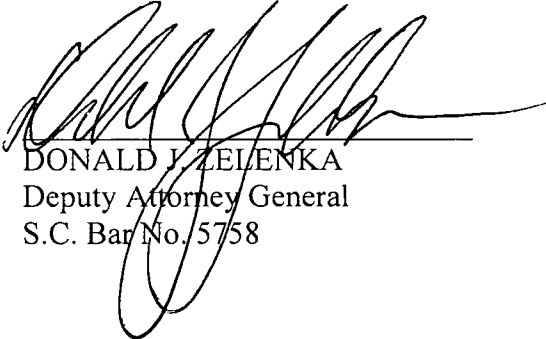
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I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Brief of Respondent on Petitioner by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record:

Wanda H. Carter, Esquire  
Deputy Chief Appellate Defender  
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 21<sup>st</sup> day of February, 2019.

  
DONALD J. ZELENKA  
Deputy Attorney General  
S.C. Bar No. 5758