STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ARSENIO D. COLCLOUGH,

APPELLANT

APPELLATE CASE NO. 2016-000724

Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

Opinion No. 2020-UP-182

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, petitioner seeks rehearing because this Court's holding that this case was controlled by the State v. Ramsey, 345 S.C. 607, 615, 550 S.E.2d 294, 298 (2001), standard that DNA evidence is admissible where it was "not so tainted that it [was] totally unreliable," and that the possible DNA contamination goes to the "weight of the evidence" and not its admissibility respectfully relies on case law, Ramsey, that can no longer be considered good law. This Court should grant rehearing and analyze this case pursuant to State v. Billy Phillips, Op. No. 27978 Shearouse's Adv. Sh. #22, at pp. 19-42 (filed June 3, 2020). Respectfully, when analyzed pursuant to State v. Phillips, which was released one week before

the opinion in this case, the DNA evidence in this case would be held not sufficiently reliable to be admitted, and it would also be excluded because the DNA evidence was unduly prejudicial and had the undue tendency to confuse the jury under Rule 403, SCRE.

Further, pursuant to State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009), relied upon by appellant, the evidence here would fail the admissibility test when considering that the trial court had the gatekeeping function to ensure that evidence was reliable prior to its admission. White also noted that the familiar evidentiary mantra that a challenge to evidence goes to its "weight and not its admissibility" may be invoked only after the trial court has vetted the matter of the qualifications of the witness and the reliability of the evidence first.

Moreover, the State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), standard cited in Phillips, which mandates that the underlining science be found reliable and that evidence must be found by the trial judge to assist the trier of fact before the evidence is admitted is hopelessly contradictory to this Court's holding that the DNA evidence is admissible as long as it is "not so tainted that it [is] *totally unreliable.*" State v. Ramsey, 345 S.C. 607, 635, 550 S.E.2d 294, 398 (2001) cited in State v. Arsenio D. Colcough, 2020-UP-182 (filed June 10, 2020). (emphasis added).

"Total unreliability" as the standard to exclude scientific evidence respectfully cannot survive the modern day standard of State v. Billy Phillips, Op. No. 27978 Shearouse's Adv. Sh. #22, at pp. 19-42 (filed June 3, 2020) and State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009), and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). A judicial finding that evidence will assist the trier of fact in coming to a correct verdict, especially following Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010) and State v. White, undoubtedly means the trial judge has done his or her gatekeeping function in finding the evidence is reliable,

that it will assist the trier of fact, that it is not unduly prejudicial, and that it will not confuse the issues or mislead jury before it is admitted. State v. Billy Phillips, Op. No. 27978 Shearouse's Adv. Sh. #22, at pp. 31-32. (filed June 3, 2020)

The DNA evidence on the red hat in this case was not turned over to the police for "about seven months after the murders." While the decedent's mother asserted that no one had allegedly touched the red hat between the time she took possession of it, and when she turned it over to Detective Gardner, and that the decedent's bedroom was "very secure" even though it was unlocked in the intervening months, the DNA evidence was not sufficiently reliable under the holdings of State v. White, State v. Council, and State v. Billy Phillips, Op. No. 27978 (filed June 3, 2020) to be admissible. While DNA evidence cannot be dated, it cannot be considered be considered reliable under the highly unusual facts of this case which are that Janice Chapman, was the mother of one of the decedents, Rayshawn, and the other decedent was her nephew. R. 55, l. 25 – 26, l. 7. Their bodies were found shot to death in the hallway of the home they shared *about a mile from Chatman's house.* Chatman called 911 after the trauma of discovering the bodies. R. 56, l. 8 – 57, l. 4.

Chatman and her sister, Evelyn, were left with the task of cleaning up the bloody house. While cleaning up the house, Chatman recalled: "I found a lot of hats. Rayshawn [her decedent son] was a hat person. He was known to wear a lot of hats." R. 57, ll. 9-13.

Chatman "thought" she found the red hat in question lying on the floor in the bloody crime scene. "*I can hardly remember where I got the hat from, but I know I got it out of the house* and I know I had it hanging up on his hat rack [in his old bedroom at her house] among his other hats." R. 57, l. 22 – 58, l. 6. (emphasis added). Chatman noted that the hat, Court's Exhibit 2, was size extra-large, which was not her son's hat size. R. 58, l. 13 – 59, l. 20.

While cleaning the house "*I got all [of] Rayshawn's stuff and I took it home.* What they didn't steal out of the house, I took home and I burnt up (sic) almost everything he had or gave it away and I kept all of his hats because he has a son, a four-year-old son, and eventually one day he might be wearing those hats." R. 63, ll. 2-10.

Chatman remembered she laid all of her son's hats on "top of each other" back at her house. "Nobody goes in his room now, since Rayshawn got killed, except me, his father, or either his son, who is four years old, and the hats hanging up in the ceiling." (emphasis added). Chatman admitted that the decedent's room was not locked. However, she reasoned only "about four or five people" had come into her house since she moved the hats back to her house. R. 63, l. 13 – 64, l. 12.

The risk of contamination of this evidence, including seven months in the hands of a private party with a vested interest in this case, where it was undisputed the evidence was comingled, "hat upon hat," and more as shown above was too great for the DNA evidence to be admissible under modern day standards, and rehearing should be granted.[1] State v. Billy Phillips, Op. No. 27978 (filed June 3, 2020); State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009); Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

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[1] Appellant continues to maintain that even under State v. Ford, 301 S.C. 485, 393 S.E.2d 781 (1990) where the Court noted that the admission of DNA evidence was subject to traditional challenges such as defective chain of custody questions and the contamination of the sample challenges that this evidence was wrongfully admitted. However, as appellant argued in his brief, the Ramsey standard on the likelihood of the contamination of the evidence only going to its weight and not its admissibility is no longer applicable. The "totally unreliable" standard is likewise outdated, and no longer applicable.

Rule 403 Objection

This Court in State v. Arsenio D. Colclough, 2020-UP-182 (filed June 10, 2020) also held that petitioner's Rule 403, SCRE argument was not preserved for appellate review because defense counsel did not repeat his objection, to again include Rule 403, SCRE at the time the evidence was admitted is respectfully using a procedural bar as a rule of affirmance rather than as a rule of fairness to the trial judge. This Court noted that defense counsel "did argue against the admission of the red hat and the DNA testimony during pre-trial motions and again following Simon's testimony, he did not contemporaneously object during Leisy's [the DNA expert's] testimony." State v. Arsenio D. Colclough, 2020-UP-182 at p. 6 (filed June 10, 2020).

Defense counsel's Rule 403 objection was well-known to the trial judge. The DNA matter was revisited during the trial. Defense counsel objected to the admission of the DNA testimony based upon the one in sixteen potential "match," and "combined with the fact that there were seven months that it was out of the custody of law enforcement after this incident . . . *on balance of Rule 403, [it] was more prejudicial than it would be probative and [it] potentially [would] confuse the jury." The judge overruled the objection stating that he would allow the DNA testimony before the jury, and he allowed it into evidence.* R. 159, l. 19 – 161, l. 4. (emphasis added).

When the hat was introduced, defense counsel renewed his previous objection, which was overruled. R. 194, l. 15-25. Thirteen transcript pages later, SLED DNA expert Catherine Liesy testified, she said the DNA may have a "one in sixteen" chance of it being appellant's DNA on the red hat. R. 207, ll. 10-25. Fifteen transcript pages later, the state also introduced the SLED DNA report of Catherine Liesy, State's Exhibit 19.. R. 209, ll. 14-21.

Respectfully, while this Court can force the Rule 403, SCRE, matter to be litigated in post-conviction relief, appellant would note that issue preservation rules "are meant to enable the lower court to properly rule after it has considered all the relevant facts, law, and arguments . . . but issue preservation is not a 'gotcha' game." State v. Bowers, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019) *citing* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 720, 724 (2000); Atl Coast Builders and Contractors, L.L.C. v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Evidence of a "one in sixteen" DNA "match" involves unfair prejudice, which is the tendency of the evidence to suggest a decision based on something other than a legitimate probative force of the evidence. Rule 403 also covers the danger that the DNA evidence "would confuse the issues or mislead the jury." See State v. Phillips, Op. No. 27978, Shearouse's Adv. Sh. No. 22 at p. 26 (filed June 3, 2020). "Unfair prejudice may arise from evidence that . . . confuses or misleads the trier of fact . . ." 29 Am. Jur. 2d and evidence § 326 (2019) *citing* State v. Franks, 335 P.3d. 725, 729 (Mont, 2014). State v. Phillips, Op. No. 27978, Shearouse's Adv. Sh. No. 22 at p. 26, n. 3 (filed June 3, 2020).

A DNA "match" of one in sixteen is hardly useful – it has minimal probative value. The population of Sumter County was 106,721 as of July 1, 2019. Meaning, appellant was in a class in that county alone of 6,670 people given that "match."[2] However, with DNA evidence undeniably having tremendous weight with the jury its tendency for undue prejudice was large. It had the very real likelihood of being confusing to the jury, thereby leading to the unfair prejudice discussed in State v. Billy Phillips, supra. This Court should grant rehearing and reconsider its holding under State v. Billy Phillips, State v. White, Watson v. Ford Motor Co.,

[2] www.census.gov

and State v. Council, supra, and its imposition of the procedural bar as to the Rule 403. SCRE objection.

Respectfully Submitted,

ROBERT M. DUDEK
Chief Appellate Defender

This 25th day of June, 2020.

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Jun 25 2020
SC Court of Appeals

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Sherrie Butterbaugh, Esquire, and Melody J. Brown, Esquire, at their primary e-mail addresses listed in the Attorney Information System (AIS), this 25th day of June, 2020.

RM McD

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT