

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ROBERT J. PHIPPS, JR.,

APPELLANT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Did the judge err by refusing to dismiss the charge on Due Process grounds when the State lost a cassette tape that contained exculpatory third party guilt information?
2. Did the judge err in refusing to allow defense counsel to question an investigator in regard to an anonymous crime stoppers tip that implicated a third party in the murder, violating the right to present a complete defense?

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. Whether the Court of Appeals correctly found that the trial judge properly denied Phipps's motion to dismiss his murder charge on due process grounds when Phipps admittedly could not establish bad faith on the part of law enforcement under *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *Illinois v. Fisher*, 540 U.S. 544, 547-49 (2004), in losing an audio cassette tape of an anonymous tip to Crime Stoppers that contained, at most, uncorroborated "potentially useful evidence" of a third party's involvement in the current murder?
- II. Whether the Court of Appeals correctly found that the trial judge properly denied Phipps's motion to dismiss the charge on due process grounds - as interpreted by the South Carolina appellate courts - since Phipps could not establish either (1) bad faith on the part of law enforcement in losing an audio cassette tape of an anonymous tip to Crime Stoppers that contained, at most, uncorroborated "potentially useful evidence" of a third party's involvement in the current murder, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and that Phipps could not obtain other evidence of comparable value by other means because the relevant information on the audio cassette was provided to the defense prior to trial?
- III. Whether the Court of Appeals correctly found that the trial judge properly refused to allow defense counsel to question Det. Porter in regard to an uncorroborated anonymous crime stoppers tip that someone other than Phipps murdered Samuel Gossett because the line of inquiry involved inadmissible and prejudicial hearsay under the South Carolina Rules of Evidence, and Phipps' fundamental right to present a complete defense does not supersede any pertinent evidentiary rules?

STATEMENT OF THE CASE

Petitioner, Robert J. Phipps, Jr., (Phipps) is currently serving a life sentence in the Lieber Correctional Institution, of the South Carolina Department of Corrections, as the result of his Spartanburg County murder conviction. The Spartanburg County Grand Jury indicted Phipps at the June 2007 07-GS-42-2902 term of court for murder (05-GS-42-3793). This charge stemmed from the April 4, 2004 stabbing of Mr. Samuel Gossett. N. Douglas Brannon and Brac Turnipseed, Esquires, represented him at trial. Deputy Seventh Circuit Solicitor Derrick Balsa, and Assistant Solicitor Bryan Kelley prosecuted the case.

On April 13-16, 2009, Phipps received a jury trial before the Honorable Roger L. Couch. The jury convicted him of murder, and Judge Couch sentenced him to life imprisonment. Phipps timely served and filed a notice of appeal.

Assistant Appellate Defender Katherine H. Hudgins has represented Phipps on appeal. Phipps filed an Amended Final Brief of Appellant on April 14, 2011, raising the same two issues that are presented on certiorari. The State, through the undersigned, filed a Final Brief of Respondent on September 7, 2010.

The Court of Appeals heard oral arguments on December 7, 2011. On January 25, 2012, the Court of Appeals affirmed the conviction and sentence. *State v. Phipps*, 2012-UP-018 (S.C. Ct.App., Jan. 25, 2012). **App. 1-2.** Phipps filed a petition for rehearing on February 9, 2012. **App. 3-8.** The Court of Appeals denied rehearing on March 2, 2012. **App. 9.** Phipps filed a Petition for Writ of Certiorari on June 1, 2012, and Respondent now makes a Return.

ARGUMENTS

I. The trial judge properly denied Phipp’s motion to dismiss the charges on due process grounds when Phipps admittedly could not establish bad faith on the part of law enforcement under *Arizona v. Youngblood* and *Illinois v. Fisher*, in losing an audio cassette tape of an anonymous tip to Crime Stoppers that contained, at most, uncorroborated “potentially useful evidence” of a third party’s involvement in the current murder. Also, Phipps failed to establish, under relevant state law, that the evidence possessed an exculpatory value apparent before the evidence was destroyed and that he could not obtain other evidence of comparable value by other means because the relevant information on the audio cassette was provided to the defense prior to trial. Phipp’s Issue 1; Respondent’s Issues I-II).

Phipps’ first argument is that the trial judge erred by denying Phipp’s motion to dismiss the charges on due process grounds because law enforcement lost an audio cassette tape of an anonymous tip to Crime Stoppers. Respondent disagrees and submits that the trial judge properly refused to dismiss on due process grounds under *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *Illinois v. Fisher*, 540 U.S. 544, 547-49 (2004), because Phipps admittedly could not establish bad faith on the part of law enforcement in losing the tape, which contained, at most, uncorroborated “potentially useful evidence” of a third party’s involvement in the current murder. Also, Phipps failed to establish under relevant state law construing *Youngblood* and *California v. Trombetta*, 467 U.S. 479 (1984), that the evidence possessed an exculpatory value apparent before the evidence was destroyed and that he could not obtain other evidence of comparable value by other means because the relevant information on the audio cassette was provided to the defense prior to trial.¹

A. How the issue developed at trial.

¹ Respondent has addressed the United States Supreme Court’s requirements for a due process violation and the requirements established by the South Carolina appellate courts separately because *Fisher* makes clear that there is no due process violation unless the defendant can establish bad faith in losing the evidence at issue. *Fisher*, 488 U.S. at 57. However, pre-*Fisher* cases by the Court of Appeals and this Court held that a defendant may prevail, even without establishing bad faith, if he can prove that the evidence possessed an exculpatory value apparent before the evidence was destroyed and that he could not obtain other evidence of comparable value by other means. *See, e.g., State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001). Respondent would ask this Court to modify its precedent to comport with the Supreme Court’s decision in *Fisher*.

In Phipps' pretrial motion to dismiss, Phipps' trial counsel explained that his motion involved an audio cassette tape recording of a phone call that came into the Spartanburg City Police Department's Crime Stoppers line. This caller identified another person as the killer of Samuel Gossett. "It's somebody other than my client." This tape was used by an investigator with the City Police Department when he played the tape during the interview of a potential witness. **R. pp. 1-2.**

Defense counsel argued that "the problem is what I have is a videotape of an interview of [the] potential witness" during which a portion of the audio cassette was played. However, counsel had not heard the entire audio cassette and he did not have a copy of it. In response to the trial judge's inquiry, counsel stated that the individual who was being interviewed was an O'Neal Sibert or Siebert and that Siebert was not on the State's witness list. **R. p. 2.**² The Deputy Solicitor confirmed that Det. Porter was "out looking for it." Before the trial judge took a luncheon recess, the Deputy Solicitor agreed to call defense counsel as soon as the tape was available. **R. p. 3.**

After the recess, the Deputy Solicitor stated that Det. Porter, who had conducted the interview and originally had the audio tape, was present. It was the Deputy Solicitor's understanding that Det. Porter did not know where the tape was. The trial judge directed the State to call Det. Porter to testify as to what efforts had been made to locate the tape but the trial judge noted that he could not order the State to produce the tape if it did not have it. **R. pp. 3-4.**³

² Apparently, the matter had been discussed in chambers, and the trial judge had indicated that he was going to ask the Deputy Solicitor to inquire about whether the tape existed. If the tape existed, then the State was to turn over a copy to trial counsel. He stated that this was his order at that point.

³ Phipps' counsel further argued that the failure to preserve the tape was possibly a violation of ¶ 8 of Chief Justice Toal's standing order requiring law enforcement agencies to turn over exculpatory evidence. However, the trial judge noted that the case had already begun before that Order was issued. When trial counsel stated that his motion was "done" if the State allowed him to question Porter during trial about the tape and the person named on it, the trial judge stated that Phipps would have to discuss that with the State. The State then proffered Det. Porter's testimony **R. pp. 4-6.**

Det. Russell Porter, from the Spartanburg Public Safety Department, testified that he was the lead investigator in this case. Mr. Gossett had died between April 3-4, 2004, but the case was not solved until 2005. Crime Stoppers tips in the case came to Porter's partner at the time, Inv. Brewster. They originally received the recording at issue, digitally. They transferred it to a cassette tape, so it could be played in the interview room.⁴ According to the caller, "the guy we [were] looking for had [gone] to Atlanta" and the man's name was Maurice Anderson. Det. Porter had not heard that name before or since. **R. pp. 6-7; 12-13.** Police did not have a true suspect until the victim's family provided him with the name of Robert Snody. Porter spoke to Snody at Snody's workplace on November 4, 2004. Snody suggested that Siebert, his co-worker, had been acting strange and that Siebert had left work for a period to make a phone call on October 3rd, around the time the Crime Stoppers tip was placed.⁵ So, Det. Porter thereafter interviewed Siebert about Siebert's activities on October 3rd. During Porter's interview of Siebert, he played a tape of a 911 call and the tape of the Crime Stoppers call, which had been received months after the murder. **R. pp. 8-10.**

Siebert told Det. Porter that he had called his daughter or "somebody about picking him up on October 3rd. Siebert never admitted making the call to Crime Stoppers, and Det. Porter still did not know who had made the call, or whether or not "it's valid." He explained that "[w]e get hundreds" of crime stoppers calls in every type of case. The information provided in these calls "[o]ften pans out to nothing." Nothing provided by Snody or Siebert aided in the investigation. **R. pp. 11-12.**

Several weeks later, Det. Porter spoke to Brenda Urquhart, the woman who had provided the

⁴ The Public Safety Department did not have the capability of playing the digital recording. **R. p. 20.**

⁵ The State introduced Snody's November 4th statement as **State's Exhibit 1 (R. pp. 367-69)**. See **R. p. 28.**

information to the victim's family that had been given to Det. Porter. While the family had given Det. Porter the name Robert Snoody, she explained that the correct name of the "Robert" to whom she had originally referred was Robert Phipps. **R. p. 12.** Although Det. Porter did not go to the hotel where the caller had said that Anderson was staying, he had called that hotel and discovered that Anderson was not registered there. He did not further pursue this tip, even though the caller mentioned that Anderson was dealing drugs because he was not a narcotics investigator.⁶ **R. pp. 12-14.**

The portion of Siebert's videotaped interview (*see Def.'s Ex. 1*) where Det. Porter played the audio cassette for Siebert was published to the trial judge. When questioned about the specific information provided by the anonymous tipster, Det. Porter denied that had said that Anderson had admitted killing Mr. Gossett. Rather, the caller claimed that he owed Anderson money. Anderson had told the caller that Anderson was in the house when Mr. Gossett was beaten, and that the caller better repay the money by Saturday, unless he wanted to "wind up face down like Samuel Gossett." The victim, however, was not found face down. **R. pp. 14-19.**

Det. Porter understood "that the State had an obligation to produce all exculpatory evidence in a case," and he indicated that he would provide the tape to the defense, if he still had it; but he did not know where it was. Also, it had been recorded off of a CD "over at 9-1-1," and it had been originally stored there because the Department did not typically use cassettes and there was not a specific place to store the cassette in the Department. When he called the 911 section, the staff there indicated that "they do not have it stored" and that "their system ha[d] cleared it out." (*Sic*). **R. pp. 19-20.** On redirect examination, Det. Porter denied that he had deliberately destroyed the audio tape.

⁶ He also admitted that Urquhart had told him that a person named "New York" had beat up the victim.

He explained that he “was in transition between three other murder cases,” and he reiterated that he did not know what had happened to the tape. Also, his investigation focused on Phipps after his conversation with Urquhart. **R. pp. 20-22.**

Phipps’ counsel argued that Phipps was entitled to dismissal of the charges because the tape was clearly exculpatory; it had been lost or destroyed by the State; and defense counsel only learned late on the Saturday night before trial.⁷ On the other hand, the Deputy Solicitor argued that there was no way to authenticate who made the call; that it was unclear what the caller actually said; that there was no bad faith because Det. Porter was working three murder cases; and that Porter simply did not know what he did with the tape. Also, Phipps’ counsel was attempting to introduce inadmissible evidence of third party guilt. **R. pp. 23-24.** Defense counsel argued that Phipps had the right to a meaningful opportunity to present a complete defense, under *Holmes v. South Carolina*, 547 U.S. 319 (2006), and that *Holmes* “overturn[ed] the South Carolina state case as to third party guilt.”⁸ The trial judge declined to rule on the admissibility of evidence relating to third party guilt, until he had heard more evidence. **R. pp. 24-25.**

In response to defense counsel’s assertion that the tape “is a portion of my full and complete defense,” the trial judge observed that he had “a portion of it obviously because . . . I just played a portion of it.” Also, it was unclear what was missing from that portion. While defense counsel agreed with the trial judge that it was a tip “from an anonymous source,” he argued that Det. Porter believed

⁷ A review of a calendar for the year 2009 reflects that he received the video on Saturday April 11th, before the trial began on April 13th.

⁸ The trial judge, however, observed that the Court of Appeals had subsequently explained that the Court in *Holmes* had merely held that the trial court could not consider the strength of the prosecution’s evidence, when ruling on the admissibility of evidence the defense proffered of third party guilt; and that the State rule otherwise remained in effect. Defense counsel agreed on this point but argued that the trial judge would hear “significant evidence of at least another person in the home on the night Mr. Gossett was killed.

that Siebert had made the call. Counsel conceded that Siebert never admitted making the call, but he argued that Siebert had refused to take a polygraph. The trial judge pointed out that Siebert had the right to refuse a polygraph and that this was fact inadmissible. **R. pp. 25-26.** Defense counsel contended that the evidence was admissible although the caller was anonymous because the tip had probative value, and that “when the Court understands the other evidence of individuals other than [Phipps] in that house, it then becomes even more probative.” The Deputy Solicitor argued that “it’s pure hearsay.” **R. pp. 26-27.**

The trial judge denied the motion to dismiss the charges. He found that there was no bad faith by the State “in the loss or destruction of the tape;” that there had not been “any evidence that it was done intentionally in any fashion;” and that “the State produced what we have so far;” and that if there was an effort to hide it or cover it up, its been a very poor effort because you found out about it and materials . . . were provided to you.” He deferred ruling on the admissibility of the tip as evidence of third party guilt. **R. pp. 27-28.** In subsequent arguments relating to whether the tip was admissible as evidence of third party guilt, the trial judge reiterated that he had found the loss of the tape “was not done in bad faith.” Phipps’ attorney stated that he was “not arguing that . . . [Porter] purposefully did away with the evidence.” **R. p. 233, ll. 20-24.**

B. The Court of Appeals’ disposition of issue.

In a *per curiam* Opinion, the Court of Appeals affirmed pursuant to Rule 220(b)(1), SCACR, and the following authority:

1. As to whether the trial court erred in denying Phipps's motion to dismiss: State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001) (requiring a defendant seeking dismissal based on loss of evidence prove either (1) the State destroyed the evidence in bad faith or (2) the evidence possessed an exculpatory value apparent before the evidence was destroyed

and the defendant cannot obtain other evidence of comparable value by other means).

App. 2.

C. Discussion.

1. There is no due process violation because Phipps admittedly cannot show any bad faith by law enforcement in losing the audio cassette.

The Court of Appeals properly affirmed the trial judge's ruling. The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. *Youngblood*, 488 U.S. at 57-58. The United States Supreme Court most recently explained the due process right of an accused where the prosecution destroys or loses "potentially useful evidence" under *Youngblood*, before his trial, in *Fisher*, 540 U.S. at 547-49:

We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In *Youngblood*, by contrast, we recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S., at 57, 109 S.Ct. 333. We concluded that the failure to preserve this "potentially useful evidence" does not violate due process "unless a criminal defendant can show bad faith on the part of the police." *Id.*, at 58, 109 S.Ct. 333 (emphasis added).

The substance seized from respondent was plainly the sort of "potentially useful evidence" referred to in *Youngblood*, not the material exculpatory evidence addressed in *Brady* and *Agurs*. At most, respondent could hope that, had the evidence been preserved, a fifth test conducted on the substance would have exonerated him. *See Youngblood*, 488 U.S., at 57, 109 S.Ct. 333. But respondent did not allege, nor did the Appellate Court find, that the Chicago police acted in bad faith when they destroyed the substance. Quite the contrary, police testing indicated that the chemical makeup of the substance inculpatated, not exculpated, respondent, *see id.*, at 57, 109 S.Ct. 333, n., and it is undisputed that police acted in "good faith and in accord with their normal practice," *id.*, at 56, 109 S.Ct. 333 (internal quotation marks omitted)

(quoting *California v. Trombetta*, 467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), in turn quoting *Killian v. United States*, 368 U.S. 231, 242, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961)). Under *Youngblood*, then, respondent has failed to establish a due process violation.

We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police. Indeed, the result reached in this case demonstrates why such a *per se* rule would negate the very reason we adopted the bad-faith requirement in the first place: to “limi[t] the extent of the police’s obligation to preserve evidence to reasonable grounds and confin[e] it to that class of cases where the interests of justice most clearly require it.” 488 U.S., at 58, 109 S.Ct. 333.

We also disagree that *Youngblood* does not apply whenever the contested evidence provides a defendant’s “only hope for exoneration” and is “ ‘essential to and determinative of the outcome of the case.’ ” App. to Pet. for Cert. 15-16 (citing *Newberry, Supra*, at 315, 209 Ill.Dec. 748, 652 N.E.2d, at 291). In *Youngblood*, the Arizona Court of Appeals said that the destroyed evidence “could [have] eliminate[d] the defendant as the perpetrator.” 488 U.S., at 54, 109 S.Ct. 333 (quotation marks and citations omitted). Similarly here, an additional test might have provided the defendant with an opportunity to show that the police tests were mistaken. It is thus difficult to distinguish the two cases on this basis. But in any event, the applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution’s case or the defendant’s defense, but on the distinction between “material exculpatory” evidence and “potentially useful” evidence. 488 U.S., at 57-58, 109 S.Ct. 333. As we have held, *supra*, at 1202, the substance destroyed here was, at best, “potentially useful” evidence, and therefore *Youngblood*’s bad-faith requirement applies.

(Emphasis in original).

Thus, *Fisher* makes clear that the appropriate due process inquiry is whether the prosecution lost or destroyed the evidence in bad faith. *Id.*⁹ In criminal cases, this Court sits only to review

⁹ As the Court explained in *Youngblood*,

Part of the reason for the difference in treatment [of *Brady* and *Trombetta/Youngblood* violations] is found in the observation made by the Court in *Trombetta, supra*, 467 U.S., at 486, 104 S.Ct., at 2532, that “[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.” Part of it stems from our unwillingness to read the “fundamental fairness” requirement of the Due Process Clause, *see Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular

errors of law, and this Court is bound by the trial judge's factual findings, unless they are clearly erroneous *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Here, Phipps conceded in the trial court and did not argue in the Court of Appeals that the prosecution had not acted in bad faith. *See R. p. 233, ll. 20-24; IBOA, p. 6*. Thus, he may not present this Court with contrary argument. *E.g., State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory in support of motion or objection at trial and a different theory on appeal). *See also Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 558, 703 S.E.2d 499, 506-07 (2010) ("An argument not made to an intermediate appellate court and ruled on by that court is not preserved for review in the Supreme Court"); *Thomas v. Atkinson*, 94 S.C. 125, _____, 77 S.E. 722, 723 (1913).

Even if Phipps had not conceded the absence of bad faith and the question was properly before this Court, the trial judge's factual finding that there was no bad faith is supported by the record and is not clearly erroneous, *see Wilson*, 345 S.C. at 5-6, 545 S.E.2d at 829, because *the only evidence is that Det. Porter did not intentionally destroy the tape*. Rather, he was working three murder cases at the time of the investigation here, and he does not know what happened to it. Also, he could not find it in the 911 section, but he would have produced it if he had been able to locate it. At worst, he was merely negligent, which does not support a finding of bad faith. *See Youngblood, supra* (no bad faith where police merely negligent). In the absence of any evidence of bad faith, the due process inquiry under *Youngblood* and *Fisher* is at an end and Phipps cannot prevail. *See Fisher*,

prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Youngblood, 488 U.S. at 57-58.

540 U.S. at 547-49; *Lambert v. Blackwell*, 387 F.3d 210, 267 (3rd Cir. 2004) (no evidence of bad faith).¹⁰

2. Phipps failed to establish, under relevant state law, that the evidence possessed an exculpatory value apparent before the evidence was destroyed and that he could not obtain other evidence of comparable value by other means because the relevant information on the audio cassette was provided to the defense prior to trial.

In several cases that predated *Fisher*, this Court and the South Carolina Court of Appeals have indicated that a defendant may prevail on a due process claim even if he cannot establish bad faith: “[t]o establish a due process violation where the State fails to preserve evidence, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. *Cheeseboro*, 346 S.C. at 538, 552 S.E.2d at 307.” *State v. Hutton*, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App. 2004) (emphasis added).¹¹ Phipps’ argument is based upon this state court authority. His argument lacks merit.

There is simply “nothing to indicate that the evidence possessed an exculpatory value that was apparent before the evidence was destroyed. Exculpatory evidence is evidence which creates a reasonable doubt about the defendant's guilt. *State v. Jarrell*, 350 S.C. 90, 107, 564 S.E.2d 362, 372 (Ct.App.2002).” *Hutton*, 358 S.C. at 631-32, 595 S.E.2d at 882. Here, he anonymous tipster is, to

¹⁰ See also *United States v. Hernandez*, 109 F.3d 1450, 1455 (9th Cir. 1997) (recognizing that *Youngblood* modified *Trombetta* by requiring the defendant to demonstrate bad faith, and holding that failure to record the interview of a child molest victim did not deny due process absent bad faith under *Youngblood*); *Grisby v. Blodgett*, 130 F.3d 365, 371 (9th Cir. 1997) (no showing of bad faith); *Phillips v. Woodford*, 267 F.3d 966, 986 (9th Cir. 2001); *Henry v. Page*, 223 F.3d 477, 480-82 (7th Cir. 2000) (disposition of petitioner’s destruction of evidence claim was reasonable application of *Trombetta* and *Youngblood*); *Mitchell v. Goldsmith*, 878 F.2d 319, 322 (9th Cir. 1989) (mere failure to preserve evidence does not violate due process); *United States v. Garcia*, 37 F.3d 1359, 1366 (9th Cir. 1994); *Torres v. Mullin*, 317 F.3d 1145, 1161 (10th Cir. 2002); *United States v. Varner*, 261 Fed.Appx. 510, 517-18 (4th Cir. 2008).

¹¹ See also *State v. Mabe*, 306 S.C. 355, 412 S.E.2d 386 (1991). Again, this alternative basis for relief is clearly not required by the “fundamental fairness” requirement of the Due Process Clause, *Youngblood*, 488 U.S. at 57-58, and this Court may wish to modify its earlier precedent to the extent that precedent holds otherwise.

date, still unidentified. Moreover, the information he provided was uncorroborated. To the contrary, Det. Porter checked with the hotel where Maurice Anderson was supposedly staying and ascertained that Anderson was not registered there. Further, the caller said the threat was that the caller would wind up face down like Mr. Gossett, but the evidence was that Mr. Gossett was found face up.¹² Therefore, Phipps “has failed to establish that police had reason to expect that the alleged evidence would play a significant role in [his] defense” when the evidence was destroyed. *Hutton*, 358 S.C. at 631-32, 595 S.E.2d at 882. *See also Trombetta*, 467 U.S. at 488 (“Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense”); *Cheeseboro*, 346 S.C. at 539, 552 S.E.2d at 307. Additionally, Phipps’ attorneys had access to the substance of at least part of the tipster’s call, since part of the call was preserved on **Defendant’s Ex. 1**. If Phipps had desired to do something further with this evidence, he could have done so at the time of trial. At the very least, he could have moved for a continuance. However, he did not do so.¹³

Further, and apart from the anonymous tip pertaining to Maurice Anderson, Phipps had other means of and did present other evidence of comparable value. Specifically, he testified that a third person, known to him only as “New York,” was present at the victim’s house when Phipps was there, and that “New York” actually killed the victim. **R. pp. 262-33; 335-46**. Also, the trial judge allowed

¹² Without any evidence corroborating the tip, there does not appear that there was sufficient probable cause for officers to obtain either a search or arrest warrant relating to Anderson in conjunction with this case. *Contra State v. Green*, 341 S.C. 214, 532 S.E.2d 896 (Ct.App. 2000).

¹³ The failure to request a continuance does not amount to ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), because the trial judge's decision to grant or refuse a motion for continuance is discretionary with the trial judge and his ruling will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of moving party. *State v. Smith*, 387 S.C. 619, 693 S.E.2d 415 (Ct.App. 2010). Likewise, "reversals of refusal of continuance are about as rare as the proverbial hens' teeth." *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Yet, no motion was made in this case.

Phipps to present evidence that, at some point in the investigation, “Sheila Mills, Shannon Evins, Eleazor Rice, John Anderson, Maurice Anderson, [and] Rusell Lynch” were considered suspects or witnesses in the case. **R. p. 237.** Defense counsel later utilized the evidence of third party guilt in closing. *See Argument II.* Therefore, Phipps’ argument lacks merit.

II. The trial judge properly refused to allow defense counsel to question Det. Porter in regard to an uncorroborated anonymous crime stoppers tip that someone other than Phipps murdered Samuel Gossett because the line of inquiry involved inadmissible and prejudicial hearsay under the South Carolina Rules of Evidence, and because Phipps’ fundamental right to present a complete defense does not supersede any pertinent evidentiary rules.

Phipps further argues that the trial judge erred by refusing to permit him to elicit evidence about the uncorroborated anonymous crime stoppers tip implicating a third person killed Samuel Gossett, on his cross-examination of Det. Porter. The State disagrees and submits that the Court of Appeals correctly found that the trial judge did not abuse his discretion because the proposed line of cross-examination involved an uncorroborated, inadmissible and prejudicial hearsay statement under the South Carolina Rules of Evidence, and because Phipps’ fundamental right to present a complete defense does not supersede any pertinent evidentiary rules.

A. How issue was raised below.

On cross-examination of Det. Porter, Phipps established, without objection, that the Spartanburg Public Safety Department had responded to another residence on the street where the victim’s house was located, on April 3, 2004 - the day before the victim’s body was found. Also, his investigation in this case had led him to interview Robert Snoody and O’Neal Siebert. **R. pp. 214-15.** He played two tapes during his interview of Siebert. The first tape was a 911 call, and he thought that the second call also went to 911, since the word “emergency” had been used by the dispatcher. **R. pp. 215-16.** The following exchange then occurred:

Q. All right. Did you play that tape for O'Neal Siebert?

A. I did.

Q. On that tape, does the caller identify an individual?

SOLICITOR BULSA: Objection, Your Honor. He's getting into hearsay also.

R. p. 216, ll. 10-14.

After the trial judge had sent the jury out, he asked Phipps' counsel to state the question that counsel planned to ask Detective Porter. Counsel stated "I think it was during your interview with O'Neal Sibert, did you play the tape. Yes. Then I said, in that tape, does the caller identify [anyone] and that's when the objection took place." The Deputy Solicitor argued that Phipps was "getting into the substance of the conversation which would call for hearsay." In response to the trial judge's inquiry, trial counsel acknowledged that he intended to ask Porter "if the caller identified an individual named Maurice Andrews as a suspect." **R. pp. 216-17.** When the trial judge asked why the proffered evidence would not be hearsay, defense counsel argued that it was an exception to the hearsay rule. The declarant was unavailable, and counsel did not have the cassette tape because it had been lost by the State. He further maintained that *Holmes* granted Phipps the opportunity to present a complete defense. The proffered evidence was relevant to third party guilty. Also, there was a "one chance in nine" that someone other than Phipps left the DNA recovered from the debris retrieved from under the victim's fingernails. **R. pp. 217-18.**¹⁴

The trial judge then stated that he was looking at Rule 804, SCRE, to which both parties were

¹⁴ On the other hand, the State argued that Phipps' contention with respect to the unavailability of the caller was wrong because "that is just a provision of the hearsay rules under which "the declarant's statement could be admissible, provided that it fit within one of the exceptions." Phipps' proffer, however, did not fit within any of those exceptions: "former testimony, statement under belief of impending death, [a] statement against interest, or [a] statement of personal family history." Also, Phipps' argument about presenting a complete defense involved third party guilt, which had been briefly "touched on" earlier. **R. p. 218, ll. 12-24.**

referring. **R. pp. 218-19.** Trial counsel argued that he proposed evidence fell within several of Rule 804's exceptions. He first argued that the caller's statement was made "under belief of impending death." However, the trial judge observed that Rule 804 (b)(2) provides that "[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by [a] declarant while believing that the declarant's death was [imminent]."¹⁵ The trial judge construed the word "imminent" to require that someone was present, when the tipster made the statement, who could injure the tipster. In listening to the portion of the tape that was played from **Defendant's Exhibit 1**, the trial judge did not "get an impression that someone was under an immediate threat of [imminent] death while they made that statement. **R. pp. 219-20.** While trial counsel agreed with both points, he argued that the declarant had made the statement to protect himself from Maurice Anderson. **R. pp. 219-20.**¹⁶ The trial judge acknowledged that this could have been the caller's state of mind, but he noted that the Rule 804 exceptions must have been *indicia* of reliability that gives some indication of the reliability that the statement was made. With respect to this call, he found that "[t]he conversation I heard could possibly be from someone who's just trying to get that other person in trouble, and [the caller] could [have] said that just for purpose of implicating someone else. I don't know." **R. pp. 220; 222.**

Phipps' counsel also maintained that the caller made a statement against interest under Rule 804(b)(3), SCRE, since the caller admitted that he owned Maurice Anderson money for drugs; and

¹⁵ Rule 804 (b)(2) further limits the statement to a statement "concerning the cause of circumstances of what the declarant believed to be impending death."

¹⁶ The trial judge's understanding was that cases permitting evidence under Rule 804(b)(2) "would be like the *res gestae* of a very serious event maybe resulting in death." **R. pp. 220-21** (emphasis added). Defense counsel noted that the trial judge had described the typical situation but argued that the caller in this case "could have been somebody who believed that . . . [Anderson] was going to kill him. . . if he didn't pay [Anderson]." **R. pp. 221-22.**

that this would have the necessary indicia of reliability.¹⁷ **R. pp. 222-23.** Phipps' counsel then asked the trial judge to consider "the totality of the circumstances" and argued that *Holmes* stated a defendant is "entitled to develop a full and complete defense. [Phipps] full and complete defense is that there was a third person in that house." However, the trial judge again noted that although *Holmes* held that the trial judge must consider the evidence of third party guilty offered by the defendant and may not consider the strength of the State's case, *Holmes* did not abolish South Carolina's rule governing the admissibility of evidence concerning third party guilty. Instead, it merely held that the rule had been misapplied by the state courts in *Holmes* because the South Carolina Supreme Court had considered the strength of the State's case in affirming the exclusion of the evidence. **R. pp. 223-24.**

Phipps' counsel admitted that the trial judge had allowed him to explore the evidence as to the possibility of randomly selecting someone who matched the DNA profile for the mixture of DNA found under the victim's fingernails, with the DNA expert. However, the court had not allowed counsel to explore the matter with Porter. The trial judge stated that "[t]he question is are we [going to] let this evidence of this unknown person who called in and left a tip on a tip line when," which "is clearly hearsay." Thus, "[t]he question is does it fit within any exception that's acceptable and that's separate and apart from third party liability. That's a question of whether its admissible period." **R. p. 224.** When defense counsel suggested that he should be permitted to ask whether Porter received a tip that identified Maurice Anderson and that this would be admissible to prove the truth of the matter asserted, the Deputy Solicitor noted that Phipps was attempting to elicit the

¹⁷ In requesting this argument, the trial judge focused upon the fact the caller's identity was unknown.

evidence to which the State objected.¹⁸ Phipps' counsel argued that he should be allowed to ask Porter to "tell me the names of all of the individuals that you have been made aware of by any source that could have been involved in this crime." The trial judge observed that this was a different question from the one that they had been discussing. When Phipps suggested that he should be allowed to follow up with further questions if Porter mentioned Maurice Anderson, the Deputy Solicitor stated that he would object to the question. **R. pp. 225-26.**¹⁹

¹⁸ In response to the trial judge's comment that Phipps had the right to ask Porter about the investigation, the Deputy Solicitor indicated that this was the reason that he did not object to questions about whether Porter had met with Snoodly and Siebert. However, Phipps was now attempting to elicit a statement to prove the matter asserted - i.e., that someone else was responsible for the crime.

¹⁹ The trial judge then made the following findings:

we are . . . talking about the question that you asked, and I'm gonna rule that it's hearsay, and it doesn't fit within one of the exceptions that you've enumerated.

So, as far as the contents of that tape, it was given by someone who's unidentified who I don't find falls, falls within any of the exceptions here for someone being unavailable because I think that, that the, the very reason that I indicated. Those exceptions are there because those statements would have some indicia or indication of truthfulness, and I don't find that with the statement that was made in this particular case. Particularly from an unidentified source, unknown person.

Now, if you want to ask, as a result of the playing of the tape, what this gentleman did in his investigation or didn't do in his investigation, I'll entertain that objection. If you want to go through a proffer, if the State wants me to have him proffer that testimony and make his objections before I bring the jury back in, I'll offer [you] an opportunity to do that.

R. p. 226-27. After the State indicated that it wished to hear the proposed inquiry, the trial judge heard Phipps' proffer:

Q. All right. Investigator Porter, would you please tell me the names of all of the potential suspects that you became aware of as a result of your investigation?

A. Javan Moore, Sheila Mills, John Anderson, Eleazor Rice, Maurice Anderson, Gary Geter, [and], Russell Lynch. That's all I can think of off the top of my head at the moment.

Q. All right. And of those people that you've just named, how many of them can you testify that you know or have reason to believe were in Mr. Gossett's house at some point?

A. All those people were except for Anderson.

Q. Well, now, my question was know or have reason to believe. Isn't it true you have---

A. Everybody except Anderson.

The Deputy Solicitor objected to the proffered evidence “as far as the naming of the tip, and I don't actually like him going into naming all the suspects. I think that actually leads into third party guilt suggesting that somebody else could of been involved.” When the trial judge stated that he was “[going to] allow him to ask those questions,” the Deputy Solicitor asked whether the court was going to allow Phipps to “go into the fact he got a tip,” the trial judge stated that he did not understand Phipps’ inquiry to ask about the substance of the tip. **R. pp. 228-29.** With respect to the tape recorded tip, the trial judge understood the caller to say that Maurice Anderson told him words

Q. Well now I think you're avoiding the question though.

THE COURT: You can't argue with the witness. You ask the question. He can answer it. I'm not gonna let you get argumentative with the witness.

Q. All right. All of those people with the one exception you have, you, you know were in the house?

A. At one point in time or another.

Q. Okay.

A. Yes, sir.

Q. And what about Mr. [Anderson]?

A. I have nothing to support that he had been in the house or been seen.

Q. But isn't it true that you have reason to believe that he may have been in that house?

A. I got a tip, but it wasn't . . . enough to follow-up and to that extent, no.

Q. But isn't a tip, wouldn't that be qualified as a reason?

A. No, it would be just a tip. That wouldn't make it a reason.

Q. Okay.

A. I couldn't make it a reason. So --.

MR. BRANNON: All right. That [is all].

R. pp. 227-28.

to the effect of “if you don't pay your debt you're gonna end up like [Mr. Gossett.] I didn't hear anything in that tape that put Mr. Anderson in the house.” He asked defense counsel to point out anything that he may have missed. Counsel argued that “before that threat, the . . . the caller says he, I was with a guy this weekend, and he told me things he did to Samuel Gossett. Then later on he says . . . , if you don't pay me my money, you're gonna end up like him. It's in the tape. . . . The caller says the man who he later identified as Maurice [Anderson] was telling him about things he did to Samuel Gossett.” **R. pp. 229-30.** The State and defense counsel then argued about whether this was what the caller said. So, the trial judge and parties listened to **Defendant's Ex. 1** again. **R. pp. 230-31.**

The trial judge then asked defense counsel whether he had read *State v. Kinloch*, 338 S.C. 385, 389, 526 S.E.2d 705, 707 (2000) (Rule 804(b)(3) requires “corroborating circumstances which clearly indicate the trustworthiness of the statement itself, *i.e.*, that the statement was actually made. The corroboration requirement is a preliminary determination as to the statement's admissibility, not an ultimate determination about the statement's truth”). Counsel stated that he had only briefly read it the preceding day and that he unprepared to discuss it. The trial judge stated that he was going to read it and he took a recess to give counsel the opportunity to do so as well. **R. pp. 231-32.** After the recess, defense counsel argued that he could not meet the requirements of *Kinloch*, since he did not have the tape. “The earliest possible moment that I could [have] known that that tape existed was about four o'clock in the afternoon last Friday . . . when the disk of the interview with O' Neal Siebert was produced for me.”²⁰ Defense counsel clarified that he was “not arguing that . . . [Porter] purposefully did away with the evidence.” Rather, he was asserting that the State's loss of the tape

²⁰ When the trial judge pointed out that the evidence at the pretrial hearing was that it was lost and would have been unavailable much earlier, counsel argued that this was why he could not meet his burden under *Kinloch*.

deprived him of the opportunity to develop a full and complete defense. He therefore asked the trial judge not to hold the State's actions against Phipps. **R. p. 232-34.**

The trial judge, however, sustained the State's objection to introduction of the tip, as follows:

It seems to me that what the defense is attempting to use this particular tape or this particular tip for is the contents of a statement made by someone, allegedly made by someone, to an anonymous tipster. The . . . statement that's in issue is the statement made by a third party who is identified by the tipster as Mr. Anderson to him, that he relays then to the operator or whoever that was, 9-1-1 operator that he was talking with at the time that he delivered the tip.

So, the question is the reliability of that first statement that was made to the tipster. That's the issue that's before the Court today.

And according to [*Kinloch*], which is a South Carolina Supreme Court . . . [case] decided in 2000, and we have not located anything that overrules [*Kinloch*], the question is the reliability of that statement, whether it can be corroborated in any fashion whatsoever as having been made in the first place to the tipster and the accuracy of the circumstances and the accuracy, accuracy of that statement when made to the tipster. I've heard no corroborating evidence as to that because, of course, the person who the police thought was the tipster denied ever having made that call or made the statement.

So, we don't have anybody to corroborate anything about the statement. . . . I hear . . . no corroboration and [*Kinloch*] says that before it becomes admissible it must . . . have some corroboration. One of the cases it cites is State versus Doctor where several people gave the same statement at different times to different people and they said that would be corroboration that what was in those statements was true. We have no other statements made by any other witnesses that corroborate this particular statement. I have heard thus far of no physical evidence that puts Mr. Anderson in this house other than what might be contained in the alleged statement that was made to an anonymous tipster.

Therefore it is my finding, under [*Kinloch*], that it does not meet the test set forth by the Supreme Court and I'm [going to] refuse to allow it to be admitted or discussed during the case. That's the ruling on that issue.

R. p. 234-36.²¹ The Court of Appeals affirmed pursuant to Rules 804(b)(2)-(3), SCRE, *Kinloch* and

²¹ Despite this ruling, the trial judge permitted Phipps to ask Porter with whom he had spoken during the investigation, "who he's investigated and what he's looked into" because Phipps had the right to cross-examine Porter

State v. Burgess, 391 S.C. 15, 22, 703 S.E.2d 512, 516 (Ct. App. 2010). **App. 2.**

B. Discussion.

The State disagrees with Phipps' claim that the trial judge's ruling denied his due process right to present a complete defense. Although not expressly discussed by the trial judge and the parties, the admissibility of the information in the tip involved hearsay within hearsay. Under Rule 805, "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Rule 805, SCRE. *See also Bain v. Self Memorial Hosp.*, 281 S.C. 138, 145, 314 S.E.2d 603, 607-08 (Ct.App.1984) (adopting Rule 805 of the Federal Rules of Evidence). Here, Phipps' proffer related to the information in the tip was inadmissible because he could not establish an adequate basis for the admissibility of either hearsay declaration. First, the trial court correctly reasoned that Phipps had failed to demonstrate that the supposed admission against interest by Maurice Anderson.²² As this Court explained in *Kinloch*:

In *State v. Doctor*, 306 S.C. 527, 413 S.E.2d 36 (1992), we first adopted the rule that out-of-court statements against penal interest made by an unavailable declarant are admissible at trial. However, *if offered to exculpate the accused in a criminal trial, they are admissible only if corroborating evidence clearly indicates the trustworthiness of the statements. See also State v. Forney*, 321 S.C. 353, 468 S.E.2d 641 (1996). An abuse of discretion standard is applied to a trial judge's ruling on the issue of whether a statement is admissible as a declaration against penal interest. *Forney, supra.*

Kinloch, 338 S.C. at 388, 526 S.E.2d at 706 (emphasis added). Rule 804(b)(3), SCRE, codified this

about the sufficiency of the investigation. "But as far as mentioning of the tip or the contents of the tip, I'm [going to] rule that inadmissible. **R. p. 236, ll. 6-12.**

²² For the Court's information, the State would note that the Crime Stoppers' tip is first played at 19:08-20:25 on **Defendant's Ex. 1**. It is again played at 27:34-29:17. It appears to the undersigned that Deputy Solicitor's understanding of the information provided by the tipster was correct, although there is a portion of the call that is unclear.

hearsay exception. *Id* (citing *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999)). “A defendant seeking to offer a statement pursuant to this exception bears the ‘formidable burden’ of establishing that corroborating circumstances clearly indicate the trustworthiness of the statement. [*Kinloch*,] 338 S.C. at 388, 526 S.E.2d at 706 (citations omitted).” *State v. Wannamaker*, 346 S.C. 495, 552 S.E.2d 284 (2001). In *Kinloch*, the Court declined to adopt a specific test to determine whether a statement has been sufficiently corroborated. Rather, the Court held that the question was left to the trial judge’s discretion “after considering the totality of the circumstances under which a declaration against penal interest was made.” *Kinloch*, 338 S.C. at 391, 526 S.E.2d at 708 n. 5.

Subsequently, the Court emphasized that, in order to fall within this exception, the defendant must prove “that the proffered statements were made by an unavailable declarant, that the statements exposed the declarant to criminal liability, and that corroborating circumstances clearly indicate the trustworthiness of the statements.” *State v. McDonald*, 343 S.C. 319, 324, 540 S.E.2d 464, 466 (2000).²³ Here, there was no corroboration that Anderson actually made the statement attributed to him. First, the declarant was a tipster, who is, even now, anonymous. Also, Det. Porter attempted to corroborate the information the tipster provided as to Anderson’s location, by checking with the hotel where Maurice Anderson was supposedly staying. When he did so, he ascertained that Anderson was not registered there.²⁴ More importantly, there is no evidence placing Anderson in the

²³ In *McDonald*, the Court stated that “[w]e take this occasion to reiterate and emphasize that *the corroboration requirement contained in Rule 804(b)(3) goes not to the truth of the statement’s contents, but rather to the making of the statement.* In many instances, it is not possible to separate these two considerations in analyzing the matter of corroboration.” *Id* (footnote omitted; emphasis added).

²⁴ Further, the tipster and Anderson were both involved in the narcotics business, which casts further doubt upon the reliability of the tipster’s claim that Anderson made an admission against evidence. *See Kinloch*, 338 S.C. at 389, 526 S.E.2d at 707. *Accord United States v. MacDonald*, 688 F.2d 224 (4th Cir.1982) (declarant’s drug use rendered her inherently unreliable and trial court did not abuse its discretion in excluding alleged declaration against penal interest).

victim's house, apart from the inferences from the statement given by the unidentified tipster. There was neither an eyewitness or forensic evidence placing him there. There is not even any evidence that the victim knew Maurice Anderson. Indeed, the *in camera* proffer of Porter's testimony established that his investigation revealed that he developed seven potential suspects in the investigation, and that he had reason to believe that each person had been in the victim's residence, at some point, with one exception: Maurice Anderson. **R. pp. 227-28.**

One point Phipps advanced in attempting to establish that the tip was corroborated was that SLED's DNA analysis of the debris under the victim's fingernails was a mixture of DNA that was consistent with DNA from the victim and Phipps. The possibility that a randomly selected person could have contributed to that profile were 1 in 9. *See R. pp. 191-92; 200-201* (testimony of SLED Agent Ken Bogan); **216-18** (argument of trial counsel). Although cleverly argued by Phipps' attorney in the lower court, there are three problems with his position. First, it is inconsistent with the admonition in *Holmes* that the trial judge is not to consider the strength of the prosecution's evidence when ruling on the admissibility of proffered third party guilt evidence. *See Holmes*, 547 U.S. at 328-31. Second, even ignoring the remainder of the DNA and fingerprint evidence, the testimony of the DNA analyst was that *this mixture of DNA was consistent with Phipps' DNA*. Thus, it was not inconsistent with Phipps' guilt. Further, it is unclear whether Anderson's DNA would be consistent with the mixture found. As the trial judge correctly reasoned, the proffered evidence could have been nothing more than the tipster's attempt to implicate Anderson in the crime. *See R. p. 220; 222*. Thus, the trial judge did not err by finding that there was insufficient evidence corroborating that Anderson actually made the statement attributed to him. Further, the tipster's statement, itself, does not fall

within any exception to the hearsay rule.²⁵ It does not appear to fall within the parameters of Rule 804(b)(3). It simply is not a statement so far “contrary to the declarant's pecuniary interest that a reasonable man in the same position would not have made the statement unless it was true,” since there was apparently a huge and painstakingly obvious motive for the tipster to lie.” *Cf. State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000). Nor do any of the other exceptions in Rule 804 apply. Thus, the trial judge’s ruling may be affirmed on this ground.²⁶

Moreover, Phipps cannot show any prejudice resulting from the trial judge’s ruling because the ruling was harmless and non-prejudicial beyond a reasonable doubt, since it could not reasonably

²⁵ Although the trial judge did not rule on this ground, “[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR.

²⁶ Phipps has not challenged the trial judge’s ruling that it was not admissible under Rule 804 (b)(2), SCRE, because there is no indication that the caller believed that his death or imminent. *Contra State v. McHoney*, 344 S.C. 85, 93-94, 544 S.E.2d 30, 33-34 (2001). Nor does Phipps’ due process right to present a complete defense require reversal of the trial judge’s ruling. In *State v. Lyles*, 379 S.C. 328, 342-343, 665 S.E.2d 201, 209 (Ct.App. 2008), the Court of Appeals explained that :

“The right to present a defense is not unlimited, but must ‘bow to accommodate other legitimate interests in the criminal trial process.’ ” [*State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct. App. 2001) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (quoting *Chambers*, 410 U.S. at 295, 93 S.Ct. 1038)). “ ‘The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.’ ” *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)) (brackets in original). Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission. *Hamilton*, 344 S.C. at 359, 543 S.E.2d at 594.

... However, “[w]hile the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.”

(Citations omitted). *See also State v. Molen*, ___ P.3d ___, 231 P.3d 1047, 1053 (Id. App. 2010). Phipps’ proffered evidence was inadmissible and prejudicial hearsay. While he had a fundamental right to present a complete defense, including the right to call witnesses on his own behalf, this right did not supersede any pertinent evidentiary rules. The testimony was inadmissible as irrelevant and unfairly prejudicial. *Lyles*, 379 S.C. at 344, 665 S.E.2d at 209.

have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (“Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial”). As discussed, separate and apart from the anonymous tip pertaining to Maurice Anderson, Phipps testified that a third person, known to him only as “New York,” was present at the victim’s house when Phipps was there, and that “New York” actually killed the victim. **R. pp. 262-333; 335-46.** Also, although the trial judge excluded the evidence of the tip, he allowed Phipps to present evidence that, at some point in the investigation, “Sheila Mills, Shannon Evins, Eleazor Rice, John Anderson, Maurice Anderson, [and Rusell Lynch]” were considered suspects or witnesses in the case. **R. p. 237.** Defense counsel later utilized the evidence of third party guilt in closing. *See Argument I.* Under these circumstances, any error was harmless. *Id.*

CONCLUSION

Based on the foregoing, it is respectfully submitted that certiorari must be denied.

Respectfully submitted,

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By: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

June 26, 2012.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge**

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ROBERT J. PHIPPS, JR.,

APPELLANT.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Appellant by depositing two (2) copies of the same via the US Mail, first class, postage pre-paid to his attorney of record Kathrine H. Hudgins, Esq., SCCID-Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

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

This 26th day of June, 2012.


WILLIAM EDGAR SALTER, III

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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUN 26 2012

S.C. Supreme Court

June 26, 2012

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *The State vs. Robert J. Phipps*

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari in the above-referenced matter.

Thank you for your assistance in this matter.

Sincerely,

William E. Salter, III
Senior Assistant Attorney General

WES/dmd
Enclosures

cc: Kathrine H. Hudgins, Esq. (w/ two (2) copies of encls.)
Honorable Barry J. Barnette, Solicitor, 7th Judicial Circuit (w/copy of encls.)
Ms. Sandi Wofford, Victim Services (w/copy of encls.)