STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2012-212387

THE STATE,

Respondent,

vs.

AHMAD JAMAL WILKINS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

I. Did the trial judge err in allowing a jailhouse snitch to testify about Appellant's alleged admission to a prior bad act involving the deceased where the prosecution failed to articulate an exception to the general prohibition against the admission of such evidence, failed to articulate the logical connection between the prior bad act and one of the exceptions, and failed to present evidence establishing the prior bad act by clear and convincing evidence?

II. Did the trial judge err by refusing to allow Appellant to present the testimony of witnesses in his case-in-chief to challenge the integrity of the police investigation in violation of Appellant's state and federal constitutional rights to present a defense?

III. Did the trial judge err in denying Appellant the ability to call witnesses in surreply where the prosecution presented new evidence on reply entitling Appellant to the right to present surreply denying Appellant's right to present a complete defense as guaranteed by the United States Constitution and the South Carolina Constitution? In the alternative, even if the prosecution did not present new evidence, did the trial judge err in denying Appellant the ability to call witnesses in surreply due to the trial judge's previous rulings denying Appellant's right to present a complete defense as guaranteed by the United States Constitution and the South Carolina Constitution?

IV. Did the trial judge err in failing to grant Appellant's motion for a mistrial where the prosecution suppressed evidence that a police officer had been implicated as the murderer and an internal investigation ensued, in violation of Appellant's state and federal constitutional rights?

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the Court of Appeals properly determined that the trial judge did not abuse his discretion by allowing the State to present evidence of statements that Wilkins made to a jailhouse informant while the two men were incarcerated together because the various admissions made by Wilkins related to his statements and actions at the time he murdered the victim and attempted to dispose of incriminating evidence at the scene by burning her body, as opposed to a prior bad act against her?

II. Whether the Court of Appeals properly determined that Wilkins' claim that he should have been allowed to call Austin and Young in his case-in-chief was not preserved for appellate review because Wilkinson failed to challenge the trial judge's ruling that this evidence was hearsay in the Initial Brief of Appellant? Also, whether the trial judge

abused his discretion by refusing to allow Wilkins to present the testimony of witnesses, in his case-in-chief, to challenge the integrity of the police investigation because the proffered evidence was remote in time, it constituted inadmissible hearsay statements by the victim and it was nothing more than a veiled effort to improperly introduce evidence of third party guilt, without presenting any evidence actually tending to establish the involvement of a third party in the victim's death?

III. Whether the Court of Appeals properly determined that Wilkins' claim that he should have been allowed to call Austin and Young as surrebuttal witnesses was not preserved for appellate review because he did not challenge the trial judge's finding that this was inadmissible hearsay in the Initial Brief of Appellant? Also, whether the trial judge abused his discretion by not allowing Wilkins to call Austin and Young as surrebuttal witnesses, after the State presented Inv. Reese and Lt. Kelly in reply to the testimony of Praylow, because the State did not introduce new matter or facts in reply and because the proffered testimony remained inadmissible hearsay and improper evidence of third party guilt?

IV. Whether the Court of Appeals properly determined that the trial judge did not err by denying Wilkin's motion for a mistrial based upon the prosecution's alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963), for suppressing evidence that reply witness Lt. Myron Kelly, of the Columbia Police Department, self-reported to the Department's Internal Affairs unit that someone started a rumor that he had been arrested for killing Ebony Williams, where no report was issued by Internal Affairs, the evidence was not materially exculpatory or impeaching and, as found by the Court of Appeals, this information was both disclosed to the defense and heard by Wilkins' jury?

STATEMENT OF THE CASE

Appellant, Ahmad Jamal Wilkins (Wilkins) is currently serving a life sentence for the February 3, 2009 murder of Ebony Williams, in Richland County, South Carolina. **R. pp. 1099**. Respondent adopts Petitioner's "Procedural history."

ARGUMENTS

I. The Court of Appeals properly found that the trial judge did not abuse his discretion by allowing the State to present evidence of statements that Wilkins made to a jailhouse informant while the two men were incarcerated together because the various admissions made by Wilkins related to his statements and actions at the time he murdered the victim and attempted to dispose of incriminating evidence at the scene by burning her body, as opposed to a prior bad act against her.

The Court of Appeals properly found that the trial judge did not abuse his discretion by allowing the State to present a jailhouse informant's testimony because when viewed in the context of the remainder of Hare's testimony, it is clear that all of the admissions made by Wilkins related to his statements and actions at the time he murdered the victim and attempted to dispose of incriminating evidence at the scene by burning her body. *See State v. Wilkins*, 2015-UP-365, 2(S.C.Ct.App., July 22, 2015).

Wilkins counsel made a pretrial motion to exclude the testimony of Patruan Hare, a inmate who had been incarcerated with Wilkins at the Alvin S. Glenn Detention Center to Rules 401, 403 and 404(b), SCRE.[1] Counsel explained that Hare had given a statement to the effect

[1] After calling the case for trial, the State made a motion based on the existence of a possible conflict of interest in the Richland County Public Defender's Office representing Wilkins at trial. Although defense counsel had not disclosed this to the prosecution, Brian Shealy was representing Hare on state court criminal charges at the time that Hare came forward with information incriminating Wilkins in this case. This came to light when the defense served a motion indicating Wilkins' intent to impeach Hare with a juvenile conviction that was not on Hare's rap sheet and of which the State had been unaware. However, defense counsel opposed the motion, Wilkins (quite understandably) waived a possible conflict and the trial judge denied the motion based upon Wilkins' waiver and the fact only Wilkins was on trial. **R. pp. 2-26**. After the trial judge had ruled, Wilkins' counsel confirmed that an investigator from the Public Defender's Office had interviewed Hare, who was not then represented by counsel on federal charges that had resulted in incarceration. **R. pp. 26-32**.

that Wilkins said, " 'They started to argue. He choked the bitch but said it wasn't the same night that she ended up dead.' " **R. p. 61**. Hare's statement "goes on to cite how he went to prison for nine months, about he was running from police, refused to turn himself in till his father convinced him, and then how Mr. Hare says that Mr. Wilkins kept lying about his whereabouts, sending police on a wild goose chase." Counsel argued that Hare's testimony concerned choking her on a prior occasion; that the entire statement was irrelevant; and that it was inadmissible under Rule 404(b). **R. pp. 61-62**.

Assistant Solicitor Campbell argued that Wilkins' argument went "to the weight and not the admissibility of the evidence;" Wilkins admitted choking the victim and it was "not unusual in a jail for a defendant to elaborate or make up things;" Hare should be allowed to testify and the jury could determine the credibility of his testimony. **R. p. 63**. After defense counsel again contended that the admissions to Hare concerned prior bad acts and were irrelevant (**R. pp. 63-65**), Assistant Solicitor Campbell argued that Wilkins' "admission of choking her is specifically pretty significant in this case because she died as a result of that." She also reiterated that it was not unusual "for a defendant to minimize their involvement [in a crime] but to make certain admissions to underlying bad acts." **R. pp. 65-66**.

Although the trial judge recognized that portions of Hare's statement may need redaction, he refused to exclude Hare's testimony in its entirety. He observed that "As far as he choked her but she didn't die that night, the evidence the State has is that the death occurred between some hour and some other hour when her body was discovered the next day." He felt that this was a matter for "the jury to kind of listen and figure out the extent to which this may implicate this defendant or not." **R. p. 66**. In response to Wilkins' statement that "this is a prior bad acts statement under 404(b)," the trial judge added that "I find that it is admissible. The weight that

the jury would give to whether he's talking about something else or not, I don't see on its face that it's referencing some other situation other than the murder of this victim." **R. pp. 66-67.**

Hare later testified that he was currently serving a fifteen year sentence in federal prison resulting from April 2010 convictions for crack cocaine and conspiracy. **R. p. 373.**[2] Hare and Wilkins were friends before Hare was incarcerated. While he was awaiting trial on the federal charges, he was housed of the Alvin S. Glenn Detention Center, from February through October of 2011. He and Wilkins were both in the J. dorm of that facility and they began talking about why they were incarcerated. Hare told Wilkins about his pending federal charges and Wilkins told Hare that the police "got him" on a murder charge for "the thing that happened in Bethel Bishop about the girl [Ebony] Williams ... being burned up." **R. pp. 373-76.** When Hare expressed disbelief in what his friend had just said, Wilkins stated, " 'Yeah, they got me for it, but they ain't got nothing on me' ...so he [was not] worrying about it." **R. p. 376.**

Over defense counsel's renewed objection, Hare testified that Wilkins said he had called Ebony one night and that investigators from the police department questioned him about this. However, they did not have a phone number and had to let him go because they could not prove anything. After he had served nine months in jail, the investigators went back to Bethel Bishop and tried to find him. He then "sent them on a wild goose chase," on the pretext that he would turn himself in and talk to them. **R. pp. 376-78.** Wilkins also claimed that police were attempting to get his DNA after his arrest, by offering him something to drink or cigarettes. He claimed that "he was too smart for that." He repeatedly refused to drink anything and even ate a cigarette butt, to prevent them from getting his DNA. **R. pp. 378-79.** When questioned about what Wilkins told him about "that night with [Ebony]," Hare testified that:

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[2] It was established in cross-examination that he was actually serving twenty years. **R. pp. 387; 390.**

> Well, he didn't never really tell me ... he killed her, but he [said] [Ebony] **called him ... that night to come chill with her** and ... they was ... in her living room on a love seat and ... he said ... if she had not ... drunk up his shit and smoked his shit, she was going to do something --you know what I'm saying?
>
> **And, ... he [said] the cameras caught him out there** like 3 -- like 2 or 3 in the morning, **but it couldn't prove ... that it was him**.

R. p. 379. (Emphasis added).

Wilkins said that he had planned to tell investigators that he was at a girl's house, as an *alibi*. However, "this girl wouldn't vouch for him, so he was just going to tell [them] that he was sitting under the bridge at 3 in the morning [because] [t]he cameras don't go under the bridge." **R. pp. 379-80**. Asked again what Wilkins had said about "that night that he went to [Ebony's] house," Hare testified that Wilkins claimed he and Ebony were "[d]rinking and smoking" at Ebony's house. At some point, Wilkins said that he wanted to have sex with her, but "she wasn't with it." Wilkins told her that "[s]he was going to do something, not drink and smoke all his shit." This led to an argument. Asked if Wilkins had said what happened as they argued, Hare testified that "[Wilkins] [s]aid he choked the bitch, but it wasn't the same night that she's supposed to have passed." **R. pp. 380-8**. Wilkins' renewed objection was overruled and Hare testified as follows:

Q Did he ever tell you how [Ebony] was killed?

A He [said] he strangled her and burned her up.

***

Q What did he say about how [Ebony] died?

A He said she got strangled and she got burnt up.

Q Did he say what strangled her?

A He said that they say a bathrobe.

Q Did he say anything about ... the thing that was strangled [(sic)], what was on it?

A His DNA.

R. pp. 381-82.

Wilkins explained the presence of his DNA by saying that his brother was a maintenance man at the complex and a friend likewise worked there. Wilkins also relayed to Hare several evidentiary items that police had told him that they had recovered from Ebony's apartment. Again, Wilkins said that this could all be explained because his brother was a maintenance man for the apartments and he worked there as well. Hare testified that Wilkins was bragging when discussing the case. Hare was hoping to be rewarded for coming forward, but he had contacted police in June 2011 because his sister had been similarly victimized. **R. pp. 382-85; p. 405.**

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id. See also State v. Collins*, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014) (same). Generally, " 'statements or declarations made by one accused of a crime are admissible against him.' *State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980). Of course, such evidence must meet the threshold test of admissibility, *i.*e., relevance." *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (citing Rule 401, SCRE). Applying the above principles to the facts of this case, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce Hare's testimony.

Wilkins' contention that these statements by him constituted evidence of prior bad acts

takes the statements out of context. As the foregoing discussion of Hare's testimony makes clear, they were admissions of a party opponent under Rule 801(d)(2), SCRE. The State's questioning of Hare was directed to what Wilkins had said occurred on the night of the killing, not at some point in the distant, or even recent, past. In other words, this was evidence concerning his statements and actions at the time he murdered the victim and attempted to dispose of incriminating evidence at the scene by burning her body, despite his efforts to suggest that the choking had occurred prior to that night. Thus, the challenged statements were relevant and admissible under Rule 801(d)(2). *Id. See also State v. Needs*, 333 S.C. 134, 149-51, 508 S.E.2d 857, 864-65 (1998); *State v. Gilchrist*, 342 S.C. 369, 372-73, 536 S.E.2d 868, 870 (2000); *State v. Caldwell*, 378 S.C. 268, 285, 662 S.E.2d 474, 483 (Ct. App. 2008); *State v. Hughes*, 336 S.C. 585, 593-94, 521 S.E.2d 500 (1999) (defendant's statements to witnesses that " 'The best feeling I ever had is when I killed that cop' " and that " 'he was going to kill him another white boy' " were admissible against defendant "as statements against his own interest and required no corroborating evidence") (citing Rule 801(d)(2), SCRE).

Because the trial judge correctly found that the challenged admissions were admissible under Rule 801(d)(2), a Rule 404(b), SCRE, analysis, as Wilkins suggests, was unnecessary. Further, much like "[t]he temporal attenuation between the making of this statement and the crime" in *Beck*, Respondent submits that Wilkins' contention that he did not admit to strangling the victim on the night of the murder "is of no moment in assessing its admissibility. ... [A]t most [this is] a matter bearing on the weight of the evidence, which was for the jury to determine." *Beck*, 342 S.C. at 135, 536 S.E.2d at 682 (citing *State v. Glenn*, 328 S.C. 300, 492 S.E.2d 393 (Ct.App.1997)). *Accord* Joseph W. Cotchett, *Federal Courtroom Evidence* §801.5.1, 21-20 (4th ed. 2000) ("A party's admissions are substantive evidence of the fact[s] stated, the

credibility of which is to be **determined by the trier of fact**") (emphasis in original). The admissibility of these admissions did not hinge upon whether he expressly admitted murdering the victim on February 3, 2009. Wilkins argument in this regard ignores that an admission need not be inculpatory in order to be admissible as nonhearsay under Rule 801. *See, e.g., United States v. McGee*, 189 F.3d 626, 632 & nn. 7-9 (7th Cir. 1999); *United States v. Slone*, 833 F.2d 595, 601 (6th Cir.1987); *United States v. Barletta*, 652 F.2d 218, 219 (1st Cir.1981).[3] Moreover, after the testimony that he choked the victim "but not on that night," Wilkins told Hare either that he strangled the victim or that "she got strangled" and was burned. Also, Wilkins was concerned because his DNA was on the bathrobe with which she was strangled. **R. pp. 381-82.**

Likewise, the challenged admissions withstand a Rule 403, SCRE, analysis. This evidence did not cause "unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." These admissions are words out of Wilkins' own mouth. Moreover, he admitted that he had choked the victim, and the other evidence presented was that she had died by strangulation.[4] This was extremely important since the prosecution's evidence was that the residents of the apartment complex where the murder occurred are very reluctant to cooperate with law enforcement. Also, even though there was overwhelming evidence of Wilkins' guilt (including the Y-profiler test

[3] "[A]n admission must be contrary to the trial position of the party against whom it is offered." *McGee*, 189 F.3d at 632 n. 9. *See also* Cotchett, *Federal Courtroom Evidence* at §801.5, 21-18. Obviously, this requirement was met here.

[4] Thus, even if Hare's testimony did concern a prior bad act by Wilkins, this evidence would have been evidence to show motive, intent, identity and common scheme or plan. *See, e.g., State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (finding prior bad acts are admissible when close similarity between the acts enhances the probative value of the evidence so as to outweigh the prejudice); *State v. Aiken*, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct.App.1996) (same). Likewise, an earlier incident in which Wilkins choked the victim for refusing to have sex with him would be admissible because "[e]vidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some connection of cause and effect between the evidence and the crime." *Plyler*, 275 S.C. at 296, 270 S.E.2d at 128.

results of touch DNA from the ligature used to strangle the victim and a glove left at the scene that could not exclude him or other paternally related males; phone records and testimony of friends showing that he was the last person known to have spoken to the victim while she was alive; and surveillance video of someone near the victim's apartment shortly before she was murdered who was dressed similarly to him), this other evidence was circumstantial and did not emanate from the mouth of the accused. *See United States v. DeAngelo*, 13 F.3d 1228, 1232 (8th Cir. 1994); *United States v. Turner*, 995 F.2d 1357, 1363 (6th Cir. 1993).

Additionally, Wilkins testified. He admitted going to the victim's apartment on the morning of the murder and he admitted that he left the glove found at the scene. However, he offered an explanation for the glove being present and he expressly denied killing the victim or that he had any reason to do so. In fact, he claimed that she performed oral sex on him in exchange for cocaine. He also presented evidence of an "alibi" and he suggested that the DNA results were consistent with having been left by his brother (Idris Wilkins), a maintenance man at the complex who had a master key for the apartments. **R. pp. 870-903; 940-41**. *See also* **R. p. 382** (Hare); **p. 527-38** (cross-examination of State's DNA analyst); **pp. 775-94** (testimony of defense's DNA analyst); **p. 1012** (closing argument of counsel). Hare's testimony contradicted much of Wilkins' testimony, by supplying a possible motive for the murder (the victim's refusal to have sex with her drug dealer, Wilkins), the identity of the killer and evidence of Wilkins' malice. Nor was Hare's testimony prejudicial to Wilkins in an evidentiary sense. As this Court has explained, " '[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' " *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). Again, the credibility of the comments did not relate to their admissibility. Also, while there was no requirement that the

admissions be corroborated in order for them to be admissible, the physical evidence at the crime scene, including the DNA testing of the bathrobe that was used as a ligature and the glove, did tend to corroborate these admissions. Moreover, Wilkins had ample opportunity to cross-examine Hare about these admissions and he availed himself of that opportunity. **R. pp. 385-404; 414**. Therefore, the admissions were admissible.

Finally, any error in the introduction of Hare's testimony must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since its introduction could not reasonably have affected the result of the trial, in light of the other circumstantial evidence of guilt that was presented. This evidence included the Y-profiler test results of touch DNA from the ligature used to strangle the victim and a glove left at the scene that could not exclude him or other paternally related males; the cell phone records of his phone and that of the victim, as well as the testimony of friends showing that he was the last person known to have spoken to the victim while she was alive; and surveillance video of someone near the victim's apartment shortly before she was murdered who was dressed similarly to him. *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"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

II. Assuming that Wilkins' second and third arguments are not procedurally barred, the trial judge did not abuse his discretion by refusing to allow him to present the testimony of witnesses, in his case-in-chief, to challenge the integrity of the police investigation because the proffered evidence was remote in time, it constituted inadmissible hearsay statements by the victim and it was nothing more than a veiled effort to improperly introduce evidence of third party guilt, without presenting any evidence actually tending to establish the involvement of the third party, Lt. Melron Kelly, in the victim's death.

Wilkins asserts that the trial judge erred by refusing to allow him to present Sierra Austin and Dawn Davis Young in his case-in-chief because their testimony allegedly would have challenged the integrity of the police investigation by "indicat[ing] the police had failed to

conduct an adequate investigation by failing to follow-up on leads concerning 'one of their own' - Melron Kelly. [Young] and Austin would have provided the link between the testimony of Tasha Praylow about the deceased's fear of Kelly" and supposed shortcomings in the City of Columbia Police Department's investigation; and that their testimony would have "show[n] a motivation for such shoddy work." However, the Court of Appeals properly determined this issue, as well as the next issue was not preserved for appellate review because, on appeal, Wilkins failed to challenge the trial judge's ruling that the proffered evidence was inadmissible hearsay, and that ruling is law of the case. *See Wilkins*, 2015-UP-365 at 2-3. Alternatively, the trial judge did not abuse his discretion in excluding this testimony because the proffered evidence was remote in time, it constituted inadmissible hearsay statements by the victim and it was nothing more than a veiled effort to improperly introduce evidence of third party guilt, without presenting any evidence actually tending to establish the involvement of the third party, Lt. Melron Kelly, in the victim's death. *Contra State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).

During the defense's case-in-chief, Assistant Solicitor Campbell observed that Wilkins had asked a police officer on cross-examination about whether "Tasha Praylow [had] accus[ed] a police officer of something untoward in this case." She noted that the trial judge had already ruled on third party guilt and she asked for notice and for the trial judge to have a hearing outside the presence of the jury prior to testimony by any witnesses who were "going to go into third-party guilt issues that violate[d]" the trial judge's previous ruling. The trial judge agreed to "conduct that hearing, if necessary." **R. p. 815**. Wilkins asserted that while the State was arguing about third party guilt, the defense "was mirroring" the Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any

favorable evidence known to the others acting on the government's behalf in the case, including the police"). After listening to further argument and Wilkins' oral proffer of the three proposed witnesses (**R. pp. 816-18**), the trial judge heard the witnesses' testimony *in camera.*

Tasha Praylow testified that she lived in Bethel Bishop Apartments. She knew Ebony Williams and saw Ebony around 11:30 p.m., on the night before Ebony's murder. Ebony supposedly told Praylow that she was scared that a police officer, Melron Kelly, was "coming to kill her." Both women were standing in the rain looking for crack cocaine when the conversation allegedly occurred. Ebony also told Praylow that she and Lt. Kelly had a "*platonic relationship.*" **R. pp. 819-21; 822; 825-27**. (Emphasis added). Praylow claimed that Inv. Reese interviewed her at her cousin's apartment, on the morning that Ebony's body was found. She asked him whether Lt. Kelly "was a suspect, and he said no." She did not tell Inv. Reese about Ebony's alleged fear of Kelly, and she never subsequently disclosed this supposed conversation to police. Rather, she first divulged it when interviewed by the defense's investigator. **R. pp. 820; p. 822-25; p. 827**.

Sierra Austin testified that she lived next door to Ebony at Bethel Bishop. Ebony allegedly told Austin "probably like two or three weeks before [the murder]" that she was pregnant and that "Officer Kelly" was the father. Austin did not know whether or not Ebony was actually pregnant. When questioned by police on the day that Ebony's body was found, Austin never mentioned this conversation with the victim. Rather, she first mentioned it when the defense investigator interviewed her. **R. pp. 828-31; 834-38**.[5] Dawn Davis Young testified that she also lived in Bethel Bishop Apartments when Ebony was murdered. "A couple of days before her death," Ebony asked Young "how would she go about messing ... around with an officer, would I do it, and I told her no." Ebony never said that she was pregnant although the

[5] During Austin's testimony and over objection, the trial judge compelled the defense to provide the State with copies of the statements that it had taken from these three witnesses. **R. pp. 829-34**.

women were "good friends," and Young did not "learn" that Ebony was supposedly pregnant, "[u]ntil after." She never told the police about this conversation and first mentioned it when the defense's investigator spoke to her. **R. -p. 839-43**.

The State argued that none of these statements were admissible because they were hearsay; they did not constitute evidence of the victim's state of mind under Rule 803(3), SCRE, *State v. Weston*, 367 S.C. 279, 625 S.E.2d 641 (2006) and *State v. Garcia*, 334 S.C. 71, 512 S.E.2d 507 (1999); and that the proffered evidence was actually an effort to improperly introduce evidence of third party guilt. **R. pp. 843-44; 847**. On the other hand, Wilkins argued that "this is relevant evidence as it goes to whether or not the defendant is guilty of murder." He characterized Praylow's testimony as the "lynchpin," which made the other testimony relevant. **R. pp. 844-46**. After reviewing *Garcia* at length, the trial judge ruled that Praylow's testimony was admissible under the state of mind exception but that the testimony of Austin and Young was inadmissible. **R. p. 847-51**.

Praylow subsequently testified before the jury that around 11:30 p.m. on the night of the incident, Praylow and Ebony were standing in the street doing crack cocaine when Ebony told Praylow that "someone was coming to kill her." Ebony identified that "someone" as "Kelly." Praylow, a confessed drug user, knew that this meant Lt. Kelly, who was in charge of the Columbia Police Department's narcotics unit. When allegedly questioned by police on the following morning, Praylow asked Inv. Kevin Reese whether Lt. Kelly was a suspect and he informed her that Lt. Kelly was not. She admitted that she never provided information about Ebony's alleged statement to law enforcement. Rather, she first revealed this a week prior to trial, when questioned by the defense investigator. **R. pp. 855-59; 862-66**. On cross-examination, Praylow testified that Ebony had asked Praylow to come to her apartment because she was

scared. Although Bethel Bishop is a closely-knit community, Praylow did not go to Ebony's apartment. Instead, "I didn't pay her no attention," and went "[a]bout my business." **R. pp. 859-61**.

Following the State's presentation of Inv. Reese and Lt. Kelly in reply, Wilkins asked for permission to call Austin and Young as surrebuttal witnesses but the trial judge ruled that he could not do so. **R. pp. 972-77**. Wilkins raised the trial judge's ruling as a ground in his April 20, 2012 motion for a new trial (**R. pp. 1196-1200**) and the State opposed this motion in the State's Response To Defense Motion For A New Trial. **R. pp. 1201-07**. The trial judge heard argument by the parties on this issue and the failure to allow the witnesses to testify in surrebuttal. **R. pp. 1102-23**. He thereafter denied the motions, in part, because the proffered amounted to "speculation" and "rumor." **R. pp. 1181-84**. *See also* **Argument III**, *infra*. Although Wilkins made arguments about exceptions to the hearsay rule at trial, these were not argued in the IBOA and were abandoned. *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal); *State v. Mitchell*, 399 S.C. 410, 420 n. 4, 731 S.E.2d 889, 895 n. 4 (Ct.App. 2012) (same). Thus, the law of the case is that this evidence was inadmissible. *See Wilkins*, at 2-3.

Alternatively, the trial judge did not abuse his discretion by not allowing Wilkins to present Austin and Young as part of his case-in-chief. The proffered testimony of statements supposedly made by the victim was rank hearsay. *See State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct.App.1996)). "Hearsay is inadmissible as evidence unless an exception applies." *Id. See also Watson v. State*, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006). Wilkins has not offered this Court any applicable exception to the hearsay rule. Instead, he asserts that the proffered testimony was admissible to demonstrate the supposed reason for his perceived

deficiencies in the investigation by the Columbia Police Department and as part of his constitutional right to present a complete defense. Yet, neither of these reasons demonstrates that the trial judge abused his discretion by excluding evidence that was otherwise patently inadmissible.

Attacking the adequacy of the investigation is not an independent basis for allowing the introduction of inadmissible evidence. Also, neither witness' testimony was relevant to proving a "shoddy" investigation, since neither woman told police the information that she allegedly had, and the women only came forward when interviewed by Wilkins' investigator, shortly before trial. Further, the Petition makes unerringly clear that the real purpose for presenting these witnesses was a veiled effort to improperly introduce evidence of third party guilt through hearsay, without presenting any evidence actually tending to establish the involvement of the third party, Lt. Melron Kelly, in the victim's death, either directly or circumstantially. Obviously, this contravenes well settled South Carolina law. Nor does Wilkins' constitutional right to present a complete defense show that the trial judge abused his discretion. As the Court explained in *State v. Burgess*, 391 S.C. 15, 21-22, 703 S.E.2d 512, 515-16 (Ct.App. 2010),

> The United States Constitution guarantees a criminal defendant the right "to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). This right is also guaranteed by our State constitution: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C. Const. art. I, § 14 (2009). *See* S.C.Code Ann. § 17–23–60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."); *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct.App.2008). In *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the United States Supreme Court stated: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302, 93 S.Ct. 1038. However, the right to introduce even relevant evidence "is not unlimited, but rather is subject to reasonable restrictions." *U.S. v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). The exclusion of witness testimony does not violate a defendant's constitutional right to present evidence so long as the evidence rules are "not 'arbitrary' or 'disproportionate to the

> purposes they are designed to serve.' " *Id.* (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

In *Gregory*, 198 S.C. at 104, 16 S.E.2d at 534-535, this Court set forth the rule governing the admissibility of evidence offered by the defendant to establish that someone else committed the offense with which he was charged. This rule for the admission of "third party guilt" was stated as follows:

> " '[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible..... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.' " 198 S.C., at 104-105, 16 S.E.2d, at 534-535 (quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur., *Evidence* § 265, p. 254 (1939); footnotes omitted).

(quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur., *Evidence* § 265, p. 254 (1939)) (footnotes omitted).

In *Holmes v. South Carolina*, 547 U.S. 319, 328-29 (2006), the United States Supreme Court held that subsequent decisions of the South Carolina Supreme Court "had radically changed and extended the rule," and that this extension violated due process by considering the weight of the prosecution's evidence when ruling on the admissibility of such evidence. 547 U.S. at 328-30. However, the rule as announced in *Gregory* is constitutional and remains in effect. *Id* at 328. *See also Burgess*, 391 S.C. at 23, 703 S.E.2d at 516-17. Also, Wilkins' due process right to present a complete defense is subservient to the well-established rule in *Gregory*. *See Holmes*, 547 U.S. at 326-28; *Burgess*, 391 S.C. at 23, 703 S.E.2d at 516-17. Wilkins cannot meet this demanding standard because there is no evidence that Lt. Kelly was in the vicinity of Bethel Bishop Apartments, much less near the victim's residence, around the time of the offense. Also,

Wilkins cannot point to an alleged admission by Lt. Kelly or any physical evidence suggesting Lt. Kelly was involved in her death. Thus, the proffered hearsay evidence was inadmissible. *Contra Holmes*, 547 U.S. at 322-23 (several witnesses placed third party in the victim's neighborhood on the morning of the assault, four other witnesses testified that third party had either acknowledged that petitioner was " 'innocent' " or had actually admitted to committing the crimes). *Accord Gregory*, 198 S.C. at 104, 16 S.E.2d at 534-535; *State v. Cope*, 405 S.C. 317, 748 S.E.2d 194 (2013), *cert. denied*, 135 S.Ct. 400 (2014).

Moreover, Wilkins cannot show any conceivable prejudice resulting from the exclusion of the proffered hearsay and, at most, the trial judge's rulings were harmless beyond a reasonable doubt. First, and assuming *arguendo* that the evidence was truly proffered to show a motive for a "shoddy" investigation or to prove further deficiencies in the investigation (as opposed to attempting to improperly end-run the limitations on evidence of third party guilt), then it was cumulative to other evidence in the record that did not constitute inadmissible hearsay. For instance, Praylow was permitted to testify that Ebony was scared Lt. Kelly was going to kill her. Additionally, the jury heard evidence that although the parties agreed that the time stamp on the surveillance video was inaccurate, Wilkins' disputed the estimated times given by Inv. Thomas and claimed that the time stamp was off by forty-seven minutes less that Inv. Thomas' admitted approximation; Lt. Kelly had been involved in seizing a comforter out of a recently-emptied dumpster; the comforter seized by Lt. Kelly was not tested for the presence of DNA; the sexual assault kit taken from the victim at autopsy was misplaced for some time by the Columbia Police Department after the analyst from the Richland County Sheriff's Department, Rachel Grant, had finished her original testing; the state's expert could find no ignitable liquids that may have been used to start the fire although opining that an ignitable liquid was used; and the dispute by

Wilkins' DNA expert as to whether, in fact, his DNA was present, as testified to by Ms. Grant.

Second, the record demonstrates that, in fact, the victim was not pregnant. On cross-examination by Wilkins, Dr. Bradley Marcus, the pathologist, testified that he looked for indications that the victim was pregnant but did not find any. This was confirmed by his failure to mention evidence of pregnancy in his report because his report would have reflected that she was pregnant if he had found signs of pregnancy. **R. pp. 590-92.**[6] Further, if he had been permitted to present these witnesses, the State could have recalled Praylow to repeat that Ebony told her that she and Kelly had a "platonic relationship." As a result, the excluded testimony did not hinder his ability to question the integrity of the investigation, nor was it relevant for purposes of an analysis under *Kyles*, *supra*. Thus, he was not prejudiced by the trial judge's ruling. *See State v. Pipkin*, 359 S.C. 322, 328, 597 S.E.2d 831, 834 (Ct.App. 2004) ("Even if excluded in error, the exclusion of evidence which would be merely cumulative to other evidence ... is harmless"); *S.C. Dep't of Highways & Pub. Transp. v. Galbreath*, 315 S.C. 82, 86, 431 S.E.2d 625, 628 (Ct.App.1993) (same); *State v. Commander*, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). Finally, there was overwhelming evidence of guilt, such that the result of the trial could not have been different, even with the excluded testimony. *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596; *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

III. Assuming that this issue is preserved for review, the trial judge did not abuse his discretion by not allowing Wilkins to call Austin and Young as surrebuttal witnesses, after the State presented Inv. Reese and Lt. Kelly in reply to the

[6] Thus, either Ebony misled Austin by falsely claiming that she was pregnant or Austin fabricated the conversation.

testimony of Praylow, because the State did not introduce new matter or facts in reply and because the proffered testimony remained inadmissible hearsay and improper evidence of third party guilt.

The Court of Appeals found that this allegation was not preserved for review because Wilkins did not challenge on appeal the trial judge's ruling that this evidence was hearsay. *Wilkins*, at 3. Assuming that the issue is properly preserved for review, the State submits that the trial judge did not abuse his discretion by refusing to allow him to call Austin and Young as witnesses in surrebuttal because the State did not introduce new matter or facts in reply and because the proffered testimony remained inadmissible hearsay and improper evidence of third party guilt.

In light of Praylow's testimony concerning her fear that Lt. Kelly was going to kill her, the State presented Inv. Reese and Lt. Kelly as reply witnesses.[7] Lt. Myron Kelly testified that he was assigned to the Columbia Police Department's investigative division, but that he had previously been a Sgt. in the narcotics unit. In that capacity, he had "worked numerous cases" at Bethel Bishop Apartments. He knew Ebony because Ebony lived on Senate Street when he was assigned as a residential officer in the Waverly-Martin Luther King neighborhood in 1999. **R. pp. 949-50**. Because he had worked the Bethel Bishop area in the narcotics unit, he went there on February 3, 2009, and assisted the investigation into Ebony's death, by identifying names and nicknames. **R. p. 951**. Lt. Kelly repeatedly denied ever threatening Ebony "in any way" at any time before she was murdered, he denied having any contact with her on February 2nd or 3rd, and he denied knowing her "in any personal capacity." Rather, his only dealings with her were "[j]ust

[7] Contrary to Praylow's testimony that she was interviewed on the morning of February 3, 2009, Inv. Reese testified that he and Inv. Thomas did not arrive at Bethel Bishop until after 1:00 p.m. that afternoon. He also denied ever speaking to Praylow or having "any contact with her whatsoever," and he denied that she ever relayed to him the information about her conversation with Ebony, to which she testified. **R. pp. 945-46**. Although he remained adamant on cross-examination that he did not speak to Praylow, he testified that he did not know why Inv. Thomas' notes reflected that they went into the building in which she lived. **R. pp. 946-48**.

knowing her as a juvenile growing up in the neighborhood." **R. pp. 951-52**. He had previously spoken to Praylow, twice, when the manager of Bethel Bishop indicated that a resident wanted to provide "drug information." He testified that the residents had "resentment" to police and he explained that "[w]hen it comes to identifying or asking for help from residents, we don't get much help." Also, it was not unusual for rumors about officers to circulate in Bethel Bishop. **R. pp. 947-48; 952-54**.

Lt. Kelly took personal leave in the summer of 2009 because he and his wife had their first child in July. However, he testified that "I was notified by one of my subordinate officers that an informant was telling them that I had been arrested for the murder of [Ebony] Williams." This was untrue because he had never been arrested. **R. p. 954**. Despite the fact there was no truth to this rumor, he "contacted the Internal Affairs Division and spoke with Lieutenant Smith. At that time I asked could I see him. When I saw him in person, I advised him of what had been said by the informant. I also prepared him a written statement and ask that he investigate it." **R. p. 955**. Internal Affairs did not issue a report on this and nothing further developed from his self-reporting. **R. p. 955**.

On cross-examination, W*ilkins twice asked whether Lt. Kelly if he had ever had a sexual relationship with the victim* and twice Lt. Kelly said that he had not. Indeed, Wilkins went so far as to assert that Lt. Kelly had committed the crime of criminal sexual conduct in second degree with a minor, by having sex with Ebony when she was merely fifteen, even though there is no evidence in the record to support this line of inquiry. The trial judge sustained the State's objection. Yet, he persisted with questions designed to imply a romantic relationship. **R. p. 958-**

60.[8] Wilkins raised the trial judge's ruling on this issue as a ground in his motion for a new trial (**R. pp. 1196-1200**) and the State opposed this motion in the State's Response To Defense Motion For A New Trial. **R. pp. 1201-07**. The trial judge heard argument by the parties on this issue and the failure to allow the witnesses to testify in the defense's case-in-chief. **R. pp. 1102-23**. He thereafter denied the motions, in large part, because the proffered evidence was based upon "speculation" and "rumor." **R. pp. 1181-84**.

"South Carolina courts have approved the use of surrebuttal testimony in the discretion of the trial court." *State v. Watson*, 353 S.C. 620, 624, 579 S.E.2d 148, 150 (Ct.App. 2003). "Admission of evidence in surrebuttal is very much in the discretion of the trial judge." *Goethe v. Browning*, 146 S.C. 7, 143 S.E. 362 (1928).[9] Respondent submits that the trial judge properly exercised his discretion by not allowing Austin and Young to testify in surrebuttal. As argued, their proffered testimony contained inadmissible hearsay statements by the victim and was nothing more than a veiled effort to improperly introduce evidence of third party guilt, without presenting any evidence actually tending to establish the involvement of Lt. Kelly in her death. Also, Wilkins' due process right to present a complete defense is subservient to the well-established rule in *Gregory*, as both the United States Supreme Court's decision in *Holmes* and

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[8] The State objected on the ground that there was "no basis" for this line of cross-examination in the record. The trial judge sustained the objection. **R. pp. 960-67**. *See State v. Lyles,* 210 S.C. 87, 91, 41 S.E.2d 625, 627 (1947) ("The cross-examiner must be fair and act in good faith. The ... the inquiry should be directed only to those matters concerning which the cross-examiner has information warranting a reasonable belief on his part that the fact is as is implied by the question"); *Duncan v. Ford Motor Co.,* 385 S.C. 119, 134, 682 S.E.2d 877, 884 (Ct.App. 2009). After the trial, the trial judge apparently ordered trial counsel to brief and argue why this cross-examination of Lt. Kelly, for which there is no evidentiary support in the record, did not violate Rule 3.1 of the Rules of Professional Conduct, Rule 407 SCACR. **R. pp. 1124-33**.

[9] "Surrebuttal is appropriate when, in the judge's discretion, new matter or new facts are injected for the first time in rebuttal[,] especially where the evidence offered in surrebuttal is for the first time made competent by the evidence introduced by plaintiff in rebuttal." *Watson*, 353 S.C. at 623, 579 S.E.2d at 150 (quoting 88 C.J.S. *Trial* § 197 (2001)). *See also State v. Summer*, 55 S.C. 32, 40, 32 S.E. 771, 774 (1899) ("[I]f the plaintiff [or the prosecution in a criminal case] in reply puts new matter in evidence, or makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal"); *Camlin v. Bi-Lo, Inc., Store No. 2*, 311 S.C. 197, 200, 428 S.E.2d 6, 8 (Ct.App. 1993).

the Court's decision in *Burgess* make clear. *See Holmes*, 547 U.S. at 326-28; *Burgess*, 391 S.C. at 23, 703 S.E.2d at 516-17.

Their testimony did not become relevant and admissible in surrebuttal simply because Wilkins elicited testimony on cross-examination that Lt. Kelly denied having a sexual relationship with the victim. The State never asked the witness about a sexual relationship with the victim. It merely wished to establish that he did not threaten the victim and only knew her because she had lived near him at one point in his career. Further, in the absence of any evidence, whatsoever, that would connect Lt. Kelly to the victim's murder, the impeachment went to a purely collateral matter and was inadmissible.[10] Certainly, there cannot be an abuse of discretion in refusing to permit Wilkins to present witnesses in surreply to impeach Lt. Kelly on a collateral matter, where Wilkins elicited the testimony that he wished to impeach and the witnesses' testimony was inadmissible under both the rule in *Gregory* and the rule against hearsay. At worst, any error was harmless beyond any reasonable doubt for the reasons set forth in **Argument II**.

IV. The trial judge did not err by denying Wilkins' motion for a mistrial based upon the prosecution's alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963), for suppressing evidence that reply witness, Lt. Myron Kelly, self-reported to the Columbia Police Department's Internal Affairs unit that someone started a rumor that he had been arrested for killing Ebony Williams, where no report was issued by Internal Affairs, the evidence was not materially exculpatory or impeaching and, most importantly, this information was both disclosed to the defense and heard by Wilkins' jury.

Wilkins asserts that the trial judge erroneously denied his motion for a mistrial based upon the prosecution's alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963), for

[10] "When a witness denies an act involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness." *State v. Beckham*, 334 S.C. 302, 321, 513 S.E.2d 606, 615 (1999). "[T]he cross-examining party is concluded by the answer which a witness gives to a question concerning a collateral matter, and no contradiction will be allowed even for the purpose of impeaching a witness." *State v. Williams*, 263 S.C. 290, 302, 210 S.E.2d 298, 304 (1974). *See also State v. Williams*, 409 S.C. 455, 467-70, 761 S.E.2d 770, 777-78 (Ct.App. 2014).

suppressing evidence that reply witness Lt. Myron Kelly, self-reported to the Columbia Police Department's Internal Affairs unit that someone started a rumor that he had been arrested for killing Ebony Williams. Respondent submits that the trial judge properly denied this motion because (1) no report was issued by Internal Affairs, (2) the evidence was not materially exculpatory or impeaching under *Brady* and its progeny and, (3) as correctly found by the Court of Appeals, this information was both disclosed to the defense and heard by Wilkins' jury. See *Wilkins*, at 3-4.

In the course of responding to the State's objection to Wilkins' cross-examination of Lt. Kelly, Wilkins moved for a mistrial based upon a supposed "*Brady* violation" because the State had only disclosed that Lt. Kelly was a possible suspect during the break shortly before Lt. Kelly's testimony as a reply witness. The trial judge denied his motion. **R. p. 957**. Wilkins raised the trial judge's denial of his mistrial motion as a ground in his motion for a new trial (**R. pp. 1196-1200**) and the State opposed this motion in the State's Response To Defense Motion For A New Trial. **R. pp. 1201-07**. At the hearing on Wilkins' new trial motion, he argued that the State did not notify the defense of the Internal Affairs investigation until "right before" Lt. Kelly testified. Wilkins admitted that, when questioned, Lt. Kelly testified that he had self-reported. However, he contended that "this would have been essential" evidence that should have been disclosed under *Kyles* and *Brady*, even if "there never was anything done about it" He contended that the inability of the defense to use this information "undermines confidence in the verdict." Further, he contended that the State could not escape the obligation to disclose this information, even if not aware of it until trial, since it was known to police. **R. p-. 1133-37**.

Assistant Solicitor Simpson argued that:

Your Honor, this matter came to our attention during the course of the defense's

> case. We then got Lt. Kelly in here and talked to him prior to him coming to court, as I told them on the day when I told them all this information. He did check in Internal Affairs.
>
> There are no documents. There's nothing he turned over. He self-reported several months after this murder occurred because he had heard a rumor. He did it out of the abundance of caution. There was no follow-up, as I informed them ... that day.
>
> There was no follow-up that they explored on the stand as far as anything else being done in this case. He merely did it out of an abundance of caution. And there is nothing that could be turned over.
>
> It's my understanding he checked with the office. There's no documentation, there's nothing else, other than what was told to them, and what was brought out on the stand, and what they cross-examined him on.
>
> I do not know how this could in any way affect the verdict in this case, because they [had] been sent all that information ahead of time. Had they informed us of their intent to accuse – Your Honor, we'd submit a [baseless] claim -- against ... he's now Capt. Kelly, Your Honor --we would have explored this at an earlier time.
>
> However, we were not aware of it. As soon as we became aware of it, we turned it over. There is nothing else to be had.

R. pp. 1137-38. The State argued that the verdict could not be affected because there was nothing left to disclose. **R. pp. 1138-39**.

Wilkins then repeated many of the arguments that he made earlier. He also contended that the Solicitor's file should have contained a note about the self-report, which would have allegedly made the implication of Kelly's involvement "more credible." When the trial judge pressed him for case law requiring disclosure of Internal Affairs reports, Wilkins asserted – without evidentiary support - that "I think someone in law enforcement found out, and the investigators in this case knew about the self-report, if the investigators had found out after another person had told somebody that ... there's talk about someone else doing that and they investigated that." In light of the other information that Wilkins had allegedly "pointing towards Melron Kelly," he contended disclosure was required. He claimed that Internal Affairs officers

could have been subpoenaed to testify about the investigation **R. pp. 1139-45**. The trial judge later denied the motion. **R. pp. 1181-84**.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). In *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), the United States Supreme Court stated the applicable law under *Brady*, as follows:

> "[T]he duty to disclose such evidence is applicable even though there has been no request by the accused, ... and ... the duty encompasses impeachment evidence as well as exculpatory evidence. . . . Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'. . . Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."

(Citations omitted). The Court in *Strickler* explained the "materiality" prong under *Brady*:

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. ... Rather, the question is whether 'the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict.

Id. at 290 (citations omitted).[11] *See also United States v. Agurs*, 427 U.S. 97 (1976); *State v. Taylor*, 339 S.C. 159, 508 S.E.2d 870, 879 (1999). There was no *Brady* violation. The making of a *Brady* request does not grant criminal defendants "unfettered access to government files." *United States v. Phillips*, 854 F.2d 273, 277 (7th Cir. 1988). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 110-11. Rather than offer idle speculation in support of this motion, it was incumbent upon Wilkins to

[11] The Court in *Strickler* found that the petitioner could not show prejudice resulting from the procedural default of his *Brady* claim because the suppressed evidence was not material. 527 U.S. at 292-96.

"establish a basis for his claim that it contains material exculpatory or impeachment evidence." *State v. Nance*, 320 S.C. 501, 504, 466 S.E.2d 349, 351 (1996).[12] Wilkins did not and could not make such a showing because the only evidence in the record is that Internal Affairs did not take any further action after Lt. Kelly self-reported the **rumor** of his arrest. Thus, his claim does not satisfy the "materiality prong because he did not prove a "reasonable probability under *Brady* and *Kyles* that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler*, 527 U.S. at 280.[13] The existence of any investigation by Internal Affairs in this case was not "material" exculpatory or impeaching information because Lt. Kelly self-reported the alleged rumor of his arrest, which was obviously false, since he was not arrested. Because the rumor was clearly and demonstrably false, Internal Affairs took no further action and no report was generated. *Brady* does not require the State to create evidence that does not otherwise exist. *See United States v. Alverio–Meléndez*, 640 F.3d 412, 424 (1st Cir. 2011) ("The failure to create exculpatory evidence does not constitute a *Brady* violation").[14]

Additionally, the absence of "materiality" is underscored by the fact that Lt. Kelly was a reply witness and was only called to refute Praylow's suggestion that the victim feared that he was going to kill her. Moreover, he did not play any significant role in the investigation of Ebony Williams' murder. Despite the scurrilous rumors proffered at trial, as well as the *innuendo* and argument by Wilkins, Lt. Kelly's involvement in the case was limited to retrieving bedding from a dumpster, which he turned over at the scene, and providing assistance with the names and

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[12] *See also, e.g., United States v. Williams*, 576 F.3d 1149, 1163 (10th Cir. 2009); *United States v. Runyan*, 290 F.3d 223, 245 (5th Cir. 2002); *Riley v. Taylor*, 277 F.3d 261, 301 (3rd Cir. 2001).

[13] As the Court stressed in *Kyles*: "The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but rather in its absence did he receive a fair trial, understood as a trial resulting in a verdict worthy of confidence 514 U.S. at 434.

[14] *See also Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir. 2002) ("the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation"); *United States v. Makarita*, 576 Fed.Appx. 252, 262 (4th Cir., June 26, 2014); *United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011).

nicknames of the residents of Bethel Bishop. Again, there was not sufficient evidence of his involvement in the victim's death to satisfy the standard of *Gregory* and *Holmes*, in spite of Wilkins' contrary contention. Most importantly, information that Lt. Kelly self-reported the rumor of his arrest and that Internal Affairs did nothing further after his self-report was disclosed prior to Lt. Kelly's testimony; he testified; and Wilkins' jury heard this information. Also, Wilkins utilized this information at trial, both on cross-examination and in closing argument. **R. pp. 968; 970-71; 1004-05; 1018-19**. No *Brady* error will occur if the material is turned over at a time when disclosure is of value, as was done in this case. E.g., *Powell v. Quarterman*, 536 F.3d 325, 340-41 (5th Cir. 2008); *Wilson v. Mitchell*, 498 F.3d 491, 512-13 (6th Cir. 2007).[15]

Respondent submits that Wilkins did not argue in support of this mistrial motion that the Internal Affairs investigation "should have been disclosed to Appellant prior to trial to permit him additional investigation." Rather, this is not preserved for review because it was first asserted at the hearing on the motion for a new trial. *See State v. Johnson*, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005); *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (an issue first raised in a post-trial motion is not preserved for appellate review); *State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981). Finally, nothing in this record suggests that further investigation of the Internal Affairs officers could have possibly had any impact on the case. Rather than attempting to satisfy the "materiality" requirement of *Brady* and its progeny, he asserts that disclosure of the Internal Affairs "investigation" was required, irrespective of whether the self-reporting resulted in materially exculpatory or impeaching information. Although the information was disclosed in this case and used at trial, his position demonstrates

[15] *See also Moore v. Casperson*, 345 F.3d 474, 492-93 (7th Cir. 2003); *Joseph v. Coyle*, 469 F.3d 441, 472 (6th Cir. 2006); *United States v. Vgeri*, 51 F.3d 876, 880 (9th Cir. 1995); *United States v. Spencer*, 753 F.3d 746, 748 (8th Cir. 2014); *Knighton v. Mullin*, 293 F.3d 1165, 1175 (10th Cir. 2002).

the weakness of his current argument because it is inconsistent with *Brady*, since the defendant's right to the disclosure of favorable evidence does not "create a broad, constitutionally required right of discovery." *United States v. Bagley*, 473 U.S. 667, 675 n. 7 (1985).

CONCLUSION

WHEREFORE, Respondent respectfully submits that certiorari must be denied.

Respectfully submitted,

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October 26, 2015.

By: 
ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal to Richland County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2015-001968

THE STATE,

Respondent,

vs.

AHMAD JAMAL WILKINS,

Petitioner.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the Return to Petition for Writ of Certiorari by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Susan B. Hackett, Esquire, SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

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

This 26th day of October, 2015.

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ATTORNEY FOR RESPONDENT