STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Beaufort County
Carmen Tevis Mullen, Circuit Court Judge

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**STATE OF SOUTH CAROLINA,**

**Respondent,**

**v.**

**EARNEST STEWART DAISE,**

**Appellant**

Appellate Case No. 2013-002394

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# AMENDED INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

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II. Did the trial court allow a witness for the State to impermissibly comment on the credibility of another witness?

III. Was the testimony that one of the victims was afraid of Appellant irrelevant, and, therefore, should have been excluded?

IV. Did the trial court err in failing to require that the Solicitor's Office produce materials amounting to a handbook on how to circumvent the requirements of *Batson*, which prevented Appellant from making a viable *Batson* challenge?

V. Did the trial court err by admitting a photograph of Appellant appearing in a custodial pose because the danger of unfair prejudice substantially outweighed the probative value of the photograph?

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VII. Did the cumulative errors committed by the trial court have the effect of preventing Appellant from receiving a fair trial, entitling Appellant to a new trial?

## RESPONDENT'S STATEMENT OF THE CASE

This case involves the November 15, 2009 murder of Jeanine Mullen and John Doe 1(her four year old son) and the assault and battery with intent to kill of her two year old son John Doe 2. The deaths and assaults arose from a declining relationship with the father of the two children Earnest Daise. Jeanine Mullen planned to end the relationship which she revealed to friends and family. Tr.p. 1995-1996, 2005-06, 2008. In the weeks leading up to the murders, the evidence of Daise's malice and intent began to reveal itself. Daise told Jeanine Mullen:

> **"Bitch, you don't know who you're messing with. I will fuck you and your kids up. I will kill you. I will kill you and your kids**

Tr.p. 2010, l. 2-6. He eventually carried out his plan on his four year old son's birthday.

On that date, Jeanine planned to have a birthday dinner at Applebee's with family, including the son's grandfather. In preparing for the gathering, Jeanine needed her white van which Daise was seen driving from her home that morning by one of her sons. Attempts to reach Daise to return the white van were unsuccessful by telephone and texts from Jeanine. See Defense Exhibit 15. Tr.p. 2231. The victim called the Appellant 13 times before the phone was turned off. Text messages advised Appellant that they needed the van. Jeanine got Daise on the telephone near dusk around 4 PM while he was at Eddie's Disco, Daise angrily responded: "who the fuck do you think you are talking to" (Tr.p. 2024, l. 9-11). He is seen in the white van at the Disco.

Later that evening, Jeanine's father went to look for him. Tr.p. 2002-2003. When the father returned around 6 PM from his search he saw the van had been returned. When he entered Jeanine's home 6 PM, he found her body, as well as her 4 year old son's body, appearing dead. He also found John Doe 2, who survived two wounds - one to his chest and one behind his ear. Tr.p. 1985-93. The weapon that Jeanine kept in her bedroom was gone. Tr.p. 2005-06.

When the paramedics arrived to address the injuries, they found John Doe 2 was unconscious. When he regained responsiveness on the way to the hospital, the paramedics asked his name and who did it to him. He responded: "Daddy." Tr.p. 1807, 1821.

Daise was found later that evening asleep at a trailer were he stayed on occasion. He made a series of statements to law enforcement in which he denied any knowledge about the event or even being at Jeanine's home the night before or the morning, or even driving the white van that day. Tr.p. 2261-2266. He laughed at inappropriate times during the interview Tr.p. 2264-66. However, despite his claim that he was not in the white van, a photograph shows he had the van at the Dobbs B.P. gas station that day. Tr. p. 2018-19, 2021. Despite his claim that he was not at the Jeanine Mullen home the night before or morning, one of the son's described him being there and leaving in the van that morning. Tr.p. 1998-2003. Despite his claim that he was not in the area that evening shortly after the time of the murder, evidence was presented that Daise asked to be picked up around 6 PM and was picked up around a mile from the crime scene by Jay Simmons who sent him a text at 6:04 PM stating "on the way." Tr.p. 2079-2082. 2075, 2159. (State Exhibit 56).

Further evidence was presented of gunshot residue consistent with having fired a weapon on the jeans Daise was wearing when he was arrested. Tr.p. 2332-35. His jeans also had traces of his blood and Jeanine Mullen's blood. Tr.p. 2362-2366.

## STATEMENT OF THE PROCEEDINGS

This case was tried as a death penalty trial before Judge Carmen Mullen from October 8 through 23, 2013 in Beaufort County. Respondent incorporates by reference the Appellant's Statement of the Case.

## ARGUMENTS

**I. The trial judge did not abuse her discretion in admitting evidence that the two-year old surviving child's statement that his name was "Doug" and when asked who hurt him, said, "Daddy" to the Emergency Medical Technician in the ongoing medical emergency when the questions were to determine his level of consciousness. The evidence was "non-testimonial" and was not a violation of the Confrontation Clause. The primary purpose of the questions were to determine his responsiveness and level of consciousness in a medical emergency. When the only issue objected at trial concerned the Confrontation Clause, any issue concerning admissibility under general evidence law was waived. However, the evidence would be admissible as an "excited utterance" and "present sense impression."**

While riding in the ambulance, immediately upon regaining consciousness from the effects of a bullet wound to his chest and behind his ear, two year old John Doe 2 responded "Daddy" when asked by a paramedic "who did this" while determining the child's level of responsiveness. The trial judge properly admitted the statements as "nontestimonial" and not a Confrontation Clause violation over a general "Crawford" objection. This was a correct conclusion and not an abuse of discretion. The evidence was also an "excited utterance" or a "present sense impression" from the event from being shot along with other family members and "nontestimonial" when it was provided to paramedics seeking information from the victim about his mental responsiveness and not for testimonial or law enforcement purposes.

### HOW THE EMT EVIDENCE WAS PRESENTED AT TRIAL

During the trial, evidence revealed that one of the victims, identified in Brief of Appellant as two year old John Doe 2, survived the injuries inflicted upon him on November 15, 2009. Paramedic Scott Sampson testified that when he entered the victim's residence, in addition to locating two individuals who appeared to be deceased, he located in a bed a young child who was breathing, whimpering and crying, and responsive to pain tests. Tr.p. 1795, l. 6-17, p. 1797, l. 10, p. 1798, l. 13. He testified that he turned the child over to Beaufort EMT Paramedic Shayna

Orsen. Tr.p. 1798 l. 14-18.

EMT Paramedic Orsen testified that she arrived at the location with EMT Crew Chief Paramedic Danny Tinnel. Tr.p. 1801. Tinnel stayed in the ambulance. At the time John Doe 2 was turned over to her "he was unresponsive" and "unconscious." Tr.p. 1803. Once he was placed on the stretcher, Orsen described doing her assessment of the child victim for signs of trauma, and finding a wound to the chest and another wound behind the ear. Tr.p. 1804. Crew Chief Tinnel applied an IV of saline in the ambulance. She described the child coming around and became responsive and was able to answer some questions and respond to pain. Tr.p. 1805. She stated when the child became responsive while inside the ambulance the victim was asked his name and responded and "it sounded like Doug" which they wrote in their report. Tr.p. 1890, l. 16-20.[1] Orsen stated EMT paramedic Tinnel asked the victim additional questions. At that point in her testimony, she stated:

> A. But another question he asked was . . . what was his name, or he asked him who did this to him who hurt him.... Crew Chief Tinnel was asking the patient who hurt him.
> Q. Okay.
> MR. McGUIRE: **Your Honor, I hate to interrupt, but for the record, we need to renew our Crawford objection.**[2]
> COURT: Thank you. It's noted for the record.

Tr.p. 1806, l. 2-19.

At that point, Orsen described Tinnel asking questions of the child "just to keep him awake and talking," including a question about who had hurt him. Tr.p. 1806, l. 23-1807, l. 1. She testified that he answered: "it sounded like Daddy." Tr.p. 1807, l. 3. She described that they

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[1] Evidence presented at trial by family members revealed that John Doe 2's nickname was "Dub" or "Little Dub" because the Appellant's nickname was "E-dub." Tr.p. 1828, l. 24- p. 1829, l.9. Further, "E-dub" was tattooed on victim Jeanine Mullen's toe. Tr.p. 1829-30.

[2] This is an unambiguous reference to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) the landmark case on Confrontation Clause issues. This is an apparent reference to the September 26, 2013 pretrial hearing where the Crawford issue was presented and denied by Judge Mullen.

passed that on and made it part of the report. Tr.p. 1807, l. 3-18.

On cross-examination Orsen confirmed that the child was initially unconscious and described it as "altered mental status."[3] Tr.p. 1810, 1813. She stated he became conscious after the IV was used during the ambulance ride. Tr.p. 1809-10. She confirmed he had mumbled something that sounded like "Daddy" when asked who hurt him. Tr.p. 1810-1811, 1814. The child subsequently became unable to respond according to her 2009 report. Tr.p. 1811-12. See Defendant's Exhibit 13. ROA _.

Similar testimony (and objection pursuant to "Crawford") occurred during Paramedic Danny Tinnel's testimony. EMT Paramedic Tinnel testified the child was initially unresponsive and became conscious. Paramedic Tinnel stated that he was within a foot of the victim. He stated that in trying "to determine his level of responsiveness we ask him what his name was and if he remembers what happened." Tr.p. 1820, l. 5-8. Paramedic Tinnel stated that the victim said his name was Doug. Tr.p. 1820, l. 9-10. At that point, defense counsel McGuire stated: **". . . just for the record, we would renew our Crawford objection."** Tr.p. 1820, l. 13-14. (Emphasis added).

After reviewing his own statement, Paramedic Tinnel stated that the child said his name was Doug while on route to the hospital. Tr.p. 1821, l. 6-7. Whether he asked further questions, Paramedic Tinnel stated "I was asking him who hurt him, and when I asked him who hurt him, he responded Daddy." Tr.p. 1821, l. 10-14. As to the victim's stating his own name, Tinnel "heard Doug, what it sounded like Doug." Tr.p. 1821, l. 19-22.

On cross-examination, he confirmed that the victim was non-responsive initially and

[3] Paramedic Orsen described "altered mental status" as a "basis of knowing if the person is cognitive of their surroundings and able to make decisions. In other words, we usually ask if the person knows their name, whether currently at, what their birthdate is, or what the date is, or another ... standard question that any person would be able to answer at that age range." She stated that "with children, it's a little different, because they're not able to tell that. But this child wasn't responsive to stimuli at all so we would consider that an altered mental status." Tr.p. 1813.

would only respond to pain when pinched, but not verbally. Tr.p. 1822-23. He confirmed that this was a hectic emergency situation. Paramedic Tinnel stated that the child was not able to answer what his daddy's name was. Tr.p. 1824, l. 10-17, p. 1825, l. 17-23.

**HOW ONLY THE CONFRONTATION CLAUSE ISSUE WAS RAISED PRETRIAL AND THE ORDER ADMITTING THE EVIDENCE AND DENYING EXCLUSION.**

A September 26, 2013 pretrial hearing was held on the Appellant's motion regarding the admissibility of the surviving two-year old child's statement to the paramedic after regaining consciousness from the injury. September 26, 2013 Tr.p. 1-48 Motion ROA _. Prior to the hearing the prosecution indicated that this was a Confrontation Clause claim and relied upon the United States Supreme Court decision of Michigan v. Bryant, 562 U.S. 344 (2011). September 26, 2013 Tr.p. 6. At the conclusion of the hearing, Judge Mullen concluded that the Sixth Amendment right to confrontation was not implicated and she was going to admit the testimony. September 26, 2013 Tr.p. 48, l. 6-22. Particularly, she held:

> COURT: . . . I don't think that what Crawford is projecting is at issue here. It's a 28-month-old. Additionally, I think it was non-testimonial. I think the paramedics were doing what they needed to do in an emergency situation, and continuing. And certainly, as they said, it wasn't to elicit testimony for a later prosecution or a trial, it was simply to treat this boy. And again, I think there were still issues at the time, but they weren't quite sure what they were dealing with. I think I heard something about the head injury, but I'm not so sure if there really was one now that I heard the testimony, partially; that they were working with competing things, so. Anyway, respectfully, I do think, again, its non-testimonial, and I'm going to let it in. . . .

September 26, 2013 Tr.p. 48, l. 6-22.

***The evidence of the statement and necessary medical purpose at the motion hearing.***

During the motion hearing, paramedic Tinnel testified that he saw the two year old child when Paramedic Orsen brought him to the ambulance. September 26, 2013 Tr.p. 9-10. The paramedic had received reports prior to arrival that it involved a shooting so they were

anticipating the possibility of critical patients. When the child was loaded into the ambulance, they made a quick assessment removing his clothes and looking for injuries. Sept. 26, 2013 Tr.p. 11, lines 18-25. At some point, they talked to the child and tried to keep him awake and alert by communicating with him. Sept. 26, 2013 Tr.p. 12. Tinnel described finding a chest wound and possible head wound so they did not know what the child's mental functions would be so they kept checking his status. Sept. 26, 2013 Tr. page 12, lines 18-25. Paramedic Tinnel stated that they normally ask "person, place, time, and event." Sept. 26, 2013 Tr. page 13, lines 6-10. He stated that he believed the victim told him "his name was Dub or Doug." [This is not John Doe 2's name – his nickname was "Dub" or "Little Dub" Tr.p. 1828)]. Sept. 26, 2013 Tr.p. 13, l. 12-13. Tinnel implied that he did not know the victim's name so he told the child, "that's fine." Paramedic Tinnel stated they usually ask what occurred and how did this happen as just general who what, where, when and why questions. Sept. 26, 2013 Tr. page 13, lines 21-25. He stated they did this "to be able to try to find if he has any other injuries and to find out what kind of injuries he sustained" because the more information they can get about what caused the injuries the better they can know how to treat. Sept. 26, 2013 Tr.p. 14, lines 1- 9. He stated that they would then turn this information over to the treating physician and nursing staff at the hospital that takes over the care. Sept. 26, 2013 Tr.p. 14, l. 18-p. 15, l. 3. He stated that he turned the victim over to the ER doctors at Beaufort Hospital and verbally gave the doctor the information the victim relayed. Sept. 26, 2013 Tr.p. 16, l. 1- p. 17.

Paramedic Tinnel stated that he asked the victim how it happened and who hurt him. "And he said Daddy." Tr.p. 18, l. 17-19. Tinnel stated he asked his dad's name and he was not able to tell him which did not surprise Tinnel due to the victim's age. Sept. 26, 2013 Tr.p. 18, l. 18-23.

On cross-examination, Tinnel confirmed that the victim was not verbally responsive initially but became verbal on route to the E.R. (Sept. 26, 2013 Tr.p. 22, l. 19- p. 23, l. 6). Tinnel stated that questions about the identity of the shooter would be used for medical treatment as the "who, what, where, when, why" would indicate if the person was oriented. Sept. 26, 2013 Tr.p. 24-25. Tinnel declared:

> "The purpose that we were going after was to determine his level of consciousness and to determine his cognitive thought process, especially with the possibility of a gunshot wound to the head."

Sept. 26, 2013 Tr.p. 25, l. 16-19. Tinnel stated that he is not an investigator and all they do is an assessment and if it leads them to think foul play may be involved to turn over that information to the physician. Sept. 26, 2013 Tr.p. 26. Tinnel denied he asked the child the questions about who hurt him to try to launch a search for the perpetrator. He said he did not radio the police with the information and kept it to himself until he arrived at the hospital. Sept. 26, 2013 Tr.p. 28, l. 9.

Tinnel stated that the whole premise behind asking the medical questions is to find out what happened, how it happened and who did it, which would make a difference in treatment if he self-inflicted the injury or if it was done by somebody else with the type of gun used. He stated that if there was a little hole due to an apparent gunshot wound to see where the hole is going. As to a two year old, the questions gives a reference point such as if he fell on a nail after slipping on the floor which aids in how to treat as compared to if someone shot him. Sept. 26, 2013 Tr.p. 29-30. Paramedic Tinnel confirmed that that the actual "who shot him" did not matter to the paramedic. Sept. 26, 2013 Tr.p. 30. Tinnel confirmed that that the child did not refer to "Daddy" by name other than "Daddy." Sept. 26, 2013 Tr.p. 31, l. 16-23.

The trial judge asked each counsel whether they had reviewed Michigan v. Bryant, which

the solicitor declared he had. Sept. 26, 2013 Tr.p. 33, l. 7-25. The trial court then clarified that they were determining whether the evidence was testimonial or non-testimonial information. Sept. 26, 2013 Tr.p. 33-34.

At the pretrial hearing, the defense called Paramedic Orsen. Sept. 26, 2013 Tr.p. 33-42. She confirmed that she was doing most of the medical treatment on the child at the time, including getting the bandage on his chest wound. She stated that she did not know the child's name at the time. When he was asked "who did it," "he mumbled something that was similar to Daddy." Sept. 26, 2013 Tr.p. 36, l. 13-16. Also Sept. 26, 2013 Tr.p. 37, l. 14-18. She confirmed that the child was initially only responsive to pain and became more responsive during the ride to the hospital after he was given fluids. Sept. 26, 2013 Tr.p. 36, l. 17-p. 37, l. 3. She also stated that when the child was asked his name, the response "sounded like he said Doug." Sept. 26, 2013 Tr.p. 37, l. 20-25. She confirmed that the answers were not important to her, just the ability of the person communicating to tell them something. Sept. 26, 2013 Tr.p. 39, l. 1-6.

On the Solicitor's questions, Paramedic Orsen confirmed that when the questions were being asked that they were assessing him for medical purposes and that these questions were something that they do on all patients, but particularly pediatric patients. Sept. 26, 2013 Tr.p. 40, l. 6-14. She rejected that the questions were asked for use as testimony later on, but that it just part of the assessment in dealing with an ongoing medical emergency. Sept. 26, 2013 Tr.p. 40, l. 14-23.

***Motion Argument on the Motion Was Only About Confrontation Clause***

Counsel McGuire conceded that he could not find any case law that would support his position, Sept. 26, 2013 Tr.p. 43, l. 14-19, p. 44, l. 10-13. He confirmed that it was a unique situation with a 28 month old child in an emergency situation. Sept. 26, 2013 Tr.p. 43, l. 15-19.

He noted that the basics of Crawford are whether it is testimonial and the child's 28 month old age must be taken into account unlike most Crawford situations which deal with adults. He stated that he would rest on the trial court being aware of the Crawford issues. Sept. 26, 2013 Tr.p. 44, l. 10-14. Counsel stated that he would object to any statements coming in pursuant to Crawford. Sept. 26, 2013 Tr.p. 45, l. 3-6.

The Solicitor addressed the Crawford test under the decision of Michigan v. Bryant. Particularly, he noted its foundation was to look at individual factors and how a reasonable person would perceive those to make the determination about whether or not the purpose behind asking these questions was to preserve testimony for trial or for some other reason. Solicitor Stone urged that the test looks at the formality of the setting (where here it was a chaotic fast-moving ambulance), whether there was an ongoing emergency (which had not ended at the time the EMT that the bleeding child out of the home), and whether the victim was answering the questions with an understanding and expectation that they would be used at trial. Sept. 26, 2013 Tr. p. 46 – 47. The Solicitor opined that the non-testimonial nature of the case is stronger with the child who is less than 3 years old with a very severe medical condition. Relying on Michigan v. Bryant the Solicitor opined this was a situation where the victim was so severely injured the response has no purpose whatsoever other than reflection. Sept. 26, 2013 Tr. p. 47 – 48.

At that point, Judge Mullen issued her oral order finding the testimony admissible and non-testimonial under Crawford and Bryant. Sept. 26, 2013 Tr. 48, lines 5-21.

**APPELLATE ISSUE CONCERNING RULE 803(4) WAS NOT RAISED OR PRESERVED BELOW**

In his brief, the Appellant initially asserts that the John Doe 2 statements to Paramedic Tinnel were inadmissible hearsay pursuant to Rule 803(4), SCRE. Initial Brief of Appellant, pp. 6-7. This rule concerns "[s]tatements made for purposes of medical diagnosis or treatment and

describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" However, the only objection made at trial to the statements were was not based upon "hearsay" or Rule 803(4), but a general objection to "renew our Crawford objection." Tr.p. 1806, l. 16-18 (Orsen); Tr.p. 1820, l. 13-14 (Tinnel). Any ambiguity concerning the limited objection is revealed in the September 26, 2013 pretrial proceedings where the hearing argument and order only addressed the Crawford issue. At no time in the trial proceedings did the Appellant challenge the John Doe 2 evidence as failing to fall under an exception to hearsay under Rule 803(4) and the prosecution was never requested to show its various bases for the admission on whether Rule 803(4) evidence was or if the basis for admitting the testimony or was it actually actually *res gestae* "excited utterance" under Rule 803(2) or "present sense impression under 803(1).

Here, the defense raised its only objection with specificity -"Crawford" - which would be solely understood as a federal Confrontation Clause claim under Crawford v. Washington. See Rule 103(a)(1), SCRE ("Error may not be predicated upon a ruling which admits ... evidence unless ... a timely objection ... appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."). cf, See State v. Kromah, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013) (holding an issue was preserved when "[t]he trial court immediately appeared to understand the objection as a ... hearsay argument").

Before this Court, the Appellant raises his primary claim on a completely different state evidentiary ground neither addressed by the trial judge nor argued to her by the defense. It is not preserved. See State v. McCray, 332 S.C. 536, 542, 506 S.E.2d 301, 303 (1998) (stating that a party may not argue one ground at trial and another on appeal). Accord State v. Gaster, 349 S.C.

545, 552, 564 S.E.2d 87, 91 (2002) (holding a constitutional claim must be raised to and ruled upon to be preserved for appellate review). This case is the flip-side of Gaster where only a constitutional claim is presented, not a state law claim but the procedural bar remains the same. At no time during the motion hearing or in his contemporaneous objection did Appellant suggest a hearsay objection as a matter of state evidentiary law. Because the Rule 803(4) issue is not preserved, inasmuch as it is not the same ground specifically raised at trial. That portion of the argument must be dismissed.

**THE ADMISSION OF THE CHILD'S STATEMENT TO THE EMT AFTER BECOMING CONSCIOUS THAT "DADDY" HURT HIM DID NOT VIOLATE THE CONFRONTATION CLAUSE WHERE ITS PRIMARY PURPOSE WAS TO DETERMINE THE ORIENTATION AND RESPONSIVENESS OF THE CHILD AFTER HE RECEIVED A HEAD WOUND AND RE-GAINED CONSCIOUSNESS AND NOT FOR ANY LAW ENFORCEMENT PURPOSE.**

The Sixth Amendment affords an accused the right "to be confronted with the witnesses against him." In Crawford v. Washington, 541 U.S. 36, 51 (2004), the Supreme Court explained that "witnesses," under the Confrontation Clause, are those "who bear testimony," and defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." "The Sixth Amendment ... prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" Ohio v. Clark, _U.S. _, _, 135 S.Ct. 2173, 2179, 192 L.Ed.2d 306 (2015) (quoting Crawford, 541 U.S. at 54)). "The proper inquiry ... [in determining whether a statement is testimonial] is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime." Since Crawford, the Supreme Court has instructed the lower federal and state courts that statements "are testimonial when ... the primary

purpose of the [statement] is to establish or prove past events potentially relevant to later criminal prosecution." Michigan v. Bryant, 562 U.S. 344, 366 (2011). However, the Supreme Court has held that when the primary purpose of the statement at issue is to assist with an ongoing emergency, the statement is not testimonial. Id. at 361; Davis v. Washington, 547 U.S. 813, 822 (2006).[4] The Supreme Court has explained that statements made to assist in an ongoing emergency are not testimonial "because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished." Bryant, supra.

The United States Supreme Court recently addressed the Confrontation Clause issue in Ohio v. Clark, _U.S._, 135 S.Ct. 2173 (2015). In that case, it held that statements made by a three year old child to his schoolteacher were not "testimonial" under Crawford, even though it would require a duty to report. "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." Ohio v. Clark, 135 S.Ct. 2173, 2182 (2015).

Of particular importance concerning the relationship between the age of the victim and the use of the statement on whether a Confrontation Clause concern exists, Ohio v. Clark addressed this issue in declaring:

> **Statements by very young children will rarely, if ever, implicate the Confrontation Clause**. Few preschool students understand the details of our criminal justice system. Rather, "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution."

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[4] In Davis, the Court offered the following formulation:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822.

> Brief for American Professional Society on the Abuse of Children as *Amicus Curiae* 7, and n. 5 (collecting sources). And Clark does not dispute those findings. Thus, it is extremely unlikely that a 3–year–old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

Ohio v. Clark, 135 S. Ct. 2173, 2182, 192 L. Ed. 2d 306 (2015) (emphasis added).

In Clark, a three year old child arrived at a day care facility with visible injuries and identified his abuser in response to questions from a teacher. Id. at 2177–78. The child's hearsay statements were admitted at a criminal trial. Id. at 2178–79. Addressing the defendant's Confrontation Clause challenge, the Court "decline[d] to adopt a categorical rule" to the effect that statements made to private individuals do not raise confrontation concerns while noting that "such statements are much less likely to be testimonial than statements to law enforcement officers." Id. at 2181. The Court identified several circumstances contributing to its determination that the evidence had not implicated the Confrontation Clause. These include that the questions and answers "were primarily aimed at identifying and ending the threat" and protecting the victim, that the "conversation ... was informal and spontaneous," that the hearsay declarant was a very young child, and that the teachers asking the questions were not "principally charged with uncovering and prosecuting criminal behavior." Id. at 2181–82.

Clark further supports our position and the trial judge's conclusion that there was no Confrontation Clause violation here. As in Clark, the record here shows an informal, spontaneous conversation between a very young child and a private individual to determine how the victim had just been injured. The age is significant since "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause" because "it is extremely unlikely that a 3–year–old child ... would intend his statements to be a substitute for trial testimony." Clark, 135 S.Ct. at 2182. Accord U.S. v. Clifford, 791 F.3d 884 (8th Cir. 2015)

(admission of victim's boyfriend's testimony recounting victim's son statement about what happened did not violate Confrontation Clause).

The United States Supreme Court addressed the Crawford calculus for determining whether a statement is testimonial in Michigan v. Bryant, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). In Bryant, the court expanded the "primary purpose" test by shifting the focus of the inquiry from the declarant's actions to those of both the declarant and the interrogator. Specifically, the Court instructed that "[i]n determining whether a declarant's statements are testimonial, courts should look to all of the relevant circumstances.... [T]he interrogator is relevant to this evaluation.... [T]he identity of an interrogator, and the content and tenor of his questions ... can illuminate the primary purpose of the interrogation." (Citations omitted; internal quotation marks omitted.) Id., at 369. Moreover, the court reaffirmed and emphasized the objective nature of this inquiry. "The statements and actions of the parties must ... be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." Id., at 360.

***The primary purpose of the Paramedic inquiry was only for medical reasons.***

Here, the primary purpose of the questions by EMT Tinnel to John Doe 2 and the responses were solely for a medical purpose and not a law enforcement purpose. The EMT's were clear that the purpose of the questions were to evaluate the child's verbal responsiveness reflective of his mental status after he had become conscious and responsive. Tr.p. 1806, l. 23-1807, l. 1 ( just to keep him awake and talking"); Tr.p. 1820, l. 5-8 ("to determine his level of responsiveness we ask him what his name was and if he remembers what happened"). This was

even clearer in the motion hearing. September 26, 2013 Tr.p. 12-15, 24-25. EMT Tinnel stated he was not an investigator and was not investigating. Sept. 26, 2013 Tr.p. 25-26. It was not the intent of Tinnel to ask the questions to launch a search for the perpetrator or see if the person was lurking outside the ambulance. Sept. 26, 2013 Tr.p. 28. The questioning was used to see if the patient was medically oriented due to the head wound and it would be asked of any patient. Sept. 26, 2013 Tr.p. 24-25. As EMT Tinnel conclusively declared:

> "The purpose that we were going after was to determine his level of consciousness and to determine his cognitive thought process, especially with the possibility of a gunshot wound to the head."

Sept. 26, 2013 Tr.p. 25, l. 16-19.[5]

Contrary to bare assertions in the Brief of Appellant, the questioning was not to pass on the information to law enforcement, but to the doctor upon arrival at the hospital for medical purposes. Sept. 26, 2013 Tr.p. 14, l. 18-p. 15, l. 3. The fact that they asked "who did this to you" was relevant in an ongoing medical emergency and was not intended for law enforcement. This is supported by the fact that upon learning the answer, the EMT took no steps to immediately relay it to law enforcement during the ride. Sept. 26, 2013 Tr.p. 28, l. 9 (he did not radio the police with the information and kept it to himself until he arrived at the hospital). The purpose was also was not for use at a later trial. Sept. 26, 2013, p. 40, l. 11-23.

Further the setting of the immediate medical emergency while riding in an ambulance plainly suggests that this was "nontestimonial." Sept 26, 2013 Tr.p. 17 (chaotic, fast paced and in need of a surgeon). Plainly, this was an ongoing emergency. Further, the child was initially unresponsive and then became unresponsive again after the questioning. Tr.p. 1811,

[5] See also, Sept. 26, 2013 Tr. page 12, lines 18-25 (described finding a chest wound and something on his head that we thought was a head wound so they did not know what his mental functions would be so they wanted to keep checking his status as they progressed to the transport). Sept. 26, 2013 Tr. page 13, lines 6-10 ( normally ask person, place, time, and event to all patients in emergency).

In light of the medical purpose, lack of law enforcement involvement or intent by the questioner, and the emergency setting with the child brief responses to determine his level of consciousness for medical purposes due to his wound, clearly the Confrontation Clause is not implicated by the nontestimonial evidence which included his response that "Daddy" did it to him to a third party paramedic. See State v. Bratschi, 413 S.C. 97, 775 S.E.2d 39 (Ct. App. 2015). ( murder victim's 911 call after fight with defendant and about her fears weeks before murder did not violate Confrontation Clause); State v. Ladner, 373 S.C. 103, 114–15, 644 S.E.2d 684, 689–90 (2007) (finding a statement by two and one-half year old child nontestimonial under Crawford where child victim identifies perpetrator to caretaker in an excited utterance ).[6]

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[6] See Wallace v. State, 836 N.E.2d 985, 996 (Ind.Ct.App.2005) (statements by murder victim identifying his killer in response to questions posed by an unknown civilian, EMT, and a nurse held non-testimonial because they were not taken " 'in significant part ... with an eye towards trial' ") (citation omitted); State v. Scacchetti, 690 N.W.2d 393, 397 (Minn.Ct.App.2005) ("[Child's] out-of-court statements to a nurse practitioner, made in a hospital while the nurse examined [child] for purposes of medical diagnosis, were not testimonial and therefore their admission did not violate Scacchetti's right to confrontation even though [child] did not testify at trial and Scacchetti did not have a prior opportunity to cross examine her."); Foley v. State, 914 So.2d 677, 683–85 (Miss.2005) (statements by sexual assault victim to examining physician indicating that defendant forced her to perform oral sex and other sexual acts were non-testimonial); State v. Vaught, 268 Neb. 316, 682 N.W.2d 284, 287–90 (2004) (child victim's statement to emergency room doctor identifying defendant as perpetrator of abuse was non-testimonial and, instead, was made for purposes of medical diagnosis and treatment inasmuch as "[t]here was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination"); State v. Fisher, 130 Wash.App. 1, 108 P.3d 1262, 1269 (2005) (statement child made to pediatrician the morning after he was admitted to the hospital was not testimonial because doctor was not a government employee, the defendant was not then under suspicion, doctor questioned child in an effort to provide him with the proper treatment, there was no government involvement, and the statement was not given under circumstances in which its use in a prosecution was reasonably foreseeable by an objective observer) State v. Hill, 236 Ariz. 162, 336 P.3d 1283, 1289 (Ariz.Ct.App.2014) (statement by pregnant teenage sexual assault victim to a forensic medical examiner in an emergency room identifying the perpetrator was nontestimonial); State v. Buda, 195 N.J. 278, 308, 949 A.2d 761 (2008) (statements made by three-and- a-half-year-old child abuse victim to a member of child abuse special response team were nontestimonial because primary purpose of the response team was to ensure child's future well-being); People v. Cage, 40 Cal.4th 965, 56 Cal.Rptr.3d 789, 155 P.3d 205, 207 (2007) (teenager's statements, in response to surgeon's question "what happened," were nontestimonial because question was aimed at helping medical treatment); People v. Vigil, 127 P.3d 916, 924 (Colo.Sup.Ct.2006) (seven–year–old child's statements to doctor regarding sexual abuse during sexual assault examination were not testimonial under Crawford test where questions aimed at identifying and relieving pain and mother was present). Also see United States v. Peneaux, 432 F.3d 882 (8th Cir.2005)(finding that the admission of statements to a physician by a child regarding physical abuse does not violate the Sixth Amendment right to confrontation). But see McCarley v. Kelly, 759 F.3d 535, 546 (6th Cir.2014) (statements by a three-year-old child to a child psychologist working at the direction of law enforcement were testimonial under Crawford); Hernandez v. State, 946 So.2d 1270, 1282–83 (Fla.Dist.Ct.App.2007) (child sexual assault victim's responses to questions asked by nurse were testimonial because the primary purpose of the colloquy was to gain information for use in future criminal prosecution).

Respondent submits that the trial court did not abuse its discretion in admitting the statements.

**THE STATEMENT IS ADMISSIBLE AS AN EXCITED UTTERANCE AND/OR PRESENT SENSE IMPRESSION**

Although there was no objection in court under state evidentiary law, Respondents note initially that the "Daddy" comment was admissible as an "excited utterance." Accord State v. Ladner, supra. (holding a trial judge did not abuse his discretion by admitting a hearsay statement under the excited utterance exception when the statement was made by a two-and-a-half year old girl to her caretakers after they discovered blood coming from her vaginal area and the statement related to the startling event of a sexual assault). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The general rule is that hearsay is not admissible. Rule 802, SCRE. There are, however, numerous exceptions to this rule, such as the excited utterance exception. The rules of evidence define excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

An excited utterance may be admitted whether or not the declarant is available as a witness. See Rule 803, SCRE (entitled "Hearsay Exceptions; Availability of Declarant Immaterial"). Moreover, when a statement is admissible because it falls within a Rule 803 exception, it may be used substantively, that is, to prove the truth of the matter asserted. State v. Dennis, 337 S.C. 275, 283–84, 523 S.E.2d 173, 177 (1999). Consequently, in the instant case, if the victim's statement qualifies as an excited utterance, the State properly admitted it to prove that appellant committed the assault.

There are three elements that must be met to find a statement to be an excited utterance:

(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). The excited utterance exception is based on the rationale that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." State v. Dennis, 337 S.C. at 284, 523 S.E.2d at 177. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court. Sims, supra.

In State v. Hendricks, 408 S.C. 525, 759 S.E2d 434 (Ct.App. 2014), the Court of Appeals held that the excited utterance exception allowed admission of a hearsay statement by a victim to her mother which identified a perpetrator. Similarly in State v. Stahlnecker, 386 S.C. 609, 690 S.E.2d 565 (2010), the Court found the victim's statement to her mother related to the startling event of a sexual assault by the defendant admissible as an "excited utterance." Plainly, the victim's comment in this setting immediately upon regaining consciousness satisfies the test. State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999) (victim's statements to police no more than one hour after physical attack by intruders were admissible under excited utterance exception to hearsay rule).

The comments from the injured child were made within moments of gaining consciousness from the wounds after fluid treatment in the ambulance. It cannot seriously be contested by the Appellant that the statement related to the startling event - being shot, that he was still under the stress of the shooting as reflected by his crying, and that the event caused the stress. His comment that the person who did it was "Daddy" satisfies this exception to hearsay.

In his argument against the medical exception and Confrontation Clause, the Appellant suggests that the age of the child which may make him incompetent to testify should preclude the admission of his hearsay statement. This suggestion is without merit and has been resolved against Appellant in State v. Ladner, supra. In Ladner, the Supreme Court resolved "the fact that a declarant is not able to testify at trial does not diminish the reliability of that declarant's excited utterance. Because the reliability of the excited utterance is unaffected by the incompetency determination, but rather is independently evaluated under long-standing rules developed from the common law, we find appellant's argument that the victim's incompetency at the time of trial should disqualify the admission of her excited utterance untenable" State v. Ladner, 373 S.C. 103, 119, 644 S.E.2d 684, 692 (2007). Further, it must be noted that in Ohio v. Clark, supra, the Supreme Court noted that the statement there involved a three-year old who identified the victim to a teacher and was deemed incompetent under Ohio law.

Further, for similar reasons, the evidence as to "who did it" may be admissible as a "present sense impression." Rule 803(1), SCRE, provides for the "present sense impression" exception, which allows for the admission of "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct.App.2014). Our courts have not delineated a time frame that would constitute "immediately thereafter"; however, this Court has held a statement given nearly ten hours after the perceived incident cannot be admitted under Rule 803(1). See State v. Burroughs, 328 S.C. 489, 499, 492

S.E.2d 408, 413 (Ct.App.1997). Here, the immediate statement by John Doe 2 after the event satisfied this exception and allows its admission under this alternate unchallenged basis. State v. Parvin, 413 S.C. 497, 777 S.E.2d 1, 4 (Ct. App. 2015), reh'g denied (Oct. 8, 2015). See State v. Moultrie, No. 2011-UP-543, 2011 WL 11735834, at *1 (S.C. Ct. App. Dec. 5, 2011). Cf, State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999) (testimony that victim told witnesses that defendant kicked her and threatened to kill her if she left him was not admissible under "present sense impression" exception to hearsay rule; there was no indication as to when defendant had kicked or threatened victim so as to determine timing of events in relation to her statements to witnesses).

**THE STATEMENT MAY BE ADMISSIBLE UNDER THE MEDICAL DIAGNOSIS EXCEPTION**

Assuming arguendo this unpreserved issue may be addressed, particularly in light of the admissibility under the "excited utterance" exception, Respondent submits that the statement that "Daddy" hurt the child may be admissible also under Rule 803(4). The Appellant contends that the admission of "Daddy" as the perpetrator to EMT paramedics in response to their inquiry did not fit the exception because it was not reasonably pertinent to medical treatment. However, the Appellant's broad brush assertions suggest these questions and responses which identify a perpetrator can never be admitted under Rule 803(4). This is an incorrect reading of the case law. Rule 803(4), SCRE, permits the introduction of hearsay for "purpose of medical diagnosis or treatment," stating:

> Statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source therefore insofar as reasonably pertinent to diagnosis or treatment....

Appellant asserts in the appeal that the identification of "Daddy" was not relevant to treatment

and therefore inadmissible. However, this broad statement is not supported by the record. This is irrelevant because the "medical exception" to the hearsay rule does not require that testimony be *introduced* for the purpose of presenting a medical diagnosis. Rather, the rule requires that the statements introduced were *made* for the purpose of medical diagnosis or treatment. *See* Rule 803(4), SCRE.

The Appellant's reliance on State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985) is misplaced. In Brown, the Court held the victim's identification of alleged rapist in an examination was inadmissible hearsay because perpetrator's name was not necessary for particular diagnosis and treatment. However, in Brown, the Court recognized that "the perpetrator's identity would *rarely* be a factor relied upon which the doctor relied in diagnosing or treating the victim. Similarly, Appellant relies upon State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987) where the Court found the physician's testimony as to a patient's history should only include those statements relayed to him by the patient upon which the physician relied in reaching medical conclusions, which in that case did not include a need for the perpetrator's name. See also State v. Camele, 293 S.C. 302, 304-05, 360 S.E.2d 307, 308 (1987) (error in the admission of Dr. Chesire's testimony because the statement implicating the appellant did not assist in her finding that the child had been sexually abused).

Here, it could be argued that the name of the perpetrator did serve a medical purpose in assisting in diagnosis his level of responsiveness. The paramedic clearly stated that there was a medical purpose involved in the inquiry. Although he did not care about the response, it was useful for his diagnosis and need concerning the effect of the head injury and blood loss during the brief ambulance ride as well as determining whether the injury was self-inflicted or an accident. This medical purpose, unlike the statements in Hudnall, Camele, and Brown, did serve

a medical purpose for the paramedics. This was the rare case of an unconscious three year in an altered mental state fluctuating in and out of consciousness where the inquiry was important to the paramedic.

**II. The trial judge did not abuse her discretion in admitting testimony from Beaufort County Staff Sergeant Fraser that an earlier story that witness Jamelle Simmons had given investigators was not credible which caused law enforcement to want to interview him again on November 18, 2009 where they received another version after Simmons was confronted with a text Simmons sent to Daise that he was "on the way." This "credibility" response was not directed at whether the witness opined the testimony Simmons gave at trial was "credible" but what led law enforcement on November 18, 2009 to re-interview Simmons after an earlier version he had given them.**

During the testimony of Staff Sergeant Jeremiah Fraser, he was asked about a decision to re-interview Jamelle "Jay" Simmons on November 18, 2009 about an earlier statement he had given law enforcement. When asked what led to the re-interview, Sergeant Frazer initially confirmed that the story Simmons had given the other officers was not credible, that they now had information that led them to believe that the stories did not seem credible, and stated that this was why they wanted to re-interview him. Tr.p. 2108-2109. This foundation question directed to the 2009 statements was presented after witness Simmons denied in his trial testimony what he had stated in the Fraser interview, as well as presenting a different version on cross-examination concerning an additional version in a statement he made to the defense in April 2012 and at trial. The evidence about the subsequent statements to Sergeant was being presented at trial pursuant to South Carolina Rule of Evidence Rule 613 as a prior inconsistent statement. [The substantive claim concerning the admission of the prior inconsistent statements is not before this Court as an issue]. Respondent submits that the evidence was not an improper comment on credibility of the trial testimony of Simmons, but what lead to the re-interviews of

the witness in 2009 where the prior inconsistent statement was developed. The trial judge did not abuse her discretion in allowing this brief and relevant testimony about the initial 2009 statement and investigation.

***The Inconsistent Statements of Jamelle "Jay" Simmons***

During the trial, Jamelle "Jay" Simmons, a friend of the Appellant, testified in the prosecution's case in chief about a series of statements he made to Beaufort County law enforcement subsequent to the murder of Jeanine Mullen and her child on November 15, 2009 about when and whether he picked up Daise that evening after the murder in an area near the scene. In particular, in his direct examination, Simmons testified that he did not talk with Daise that night, although he had received a couple of telephone calls from him. Tr.p. 2065, l. 10-16. At that point Simmons was questioned about statements that he gave to Beaufort law enforcement and particularly about a statement given on November 18, 2009 to Beaufort County Staff Sergeant Jeremiah Fraser as a prior inconsistent statement. Tr.p. 2065-2066, 2072-2084. During Simmons direct examination through the Solicitor's office, he denied talking with Daise on November 15, 2009. Tr.p. 2072, l. 6-10. However, he admitted that he picked up Daise and gave him a ride after 6 PM off the side of the road on the main highway. Tr.p. 2072, l. 15-23. He denied telling Fraser that he picked Daise up that the intersection of Porch Hill Road and Keans Neck Road, asserting that he did not know the names of the road. Tr.p. 2073, l. 1 – 23. Simmons admitted that he rode with the officer to an area and identified where he picked up Daise off the road. Tr.p. 2074, l. 13-19. He also admitted that he sent Daise a text that stated "on the way" at 6:04 pm that was prior to him picking Daise up. Tr.p. 2075, l. 12-20.[7] See Tr.p.

[7] The text was recovered from the witness's cellphone recovered from the search of his home. Tr.p. 2111, 2158. A photograph of the message was introduced as State Exhibit 56. Simmons initially adamantly denied having a cellphone during the first portion of his interview. Tr.p. 2110-11. Sergeant Fraser reported that when they recovered

2159, l. 12-14., p. 2160 (State Exhibit 56). Simmons was asked how Daise appeared when he picked him up and Simmons testified that "he seemed all right." Tr.p. 2075, l. 19-23. However, he denied telling Fraser that Daise acted like he had been robbed and was stressed. Tr.p. 2075, l. 19- p. 2076, l. 10. In addition, Simmons denied telling Fraser in the interview that Daise was begging him to come pick him up and told him he was on his way. Tr.p. 2077, l. 24- p. 2078, l. 3. Simmons testified that after he picked Daise up that he went to a store and dropped Daise off down Poppy Hill Road near the tracks. Tr.p. 2078, l. 6-19. Simmons testified that he did not see Daise between the time he dropped him off and when the police later showed up at his residence. Tr.p. 2078, l. 20-23, p. 2080, l. 15-17.

Concerning the "on the way" text of 6:04 PM, Simmons confirmed it was from his cell phone but did not know what time it was sent. Tr.p. 2079. He also confirmed that he picked Daise after he sent the text. Tr.p. 2080, l. 2-4. However, he stated he did not remember what time he got home. However, he did recall telling Fraser that his girlfriend Asia Palmer got off work around 6:30 and usually got home between 6:30 and 7:00 and that he was home before she made it home before 7:00. Tr.p. 2080, l. 7-14.[8]

Simmons testified that he did remember how he knew where to go to pick up Daise or why he texted him and that Daise was walking when he picked him up. Tr.p. 2081. He did know that Jeanine had a white van and that Daise drove that van but he did not have the van at the time he picked him up. Tr.p. 2082.

During the cross-examination by the defense, Simmons recalled being interviewed by

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the cell phone from Simmons's residence and he was confronted with the text, his story changed. Tr.p. 2111, l. 7-18, 2118. At that point he advised the officer that some of what he said was true, but presented a different version.

[8] Simmons had earlier testified that Daise had a room in the trailer at Poppy Hill where Simmons and his girlfriend Asia Palmer lived. He stated that he had given Daise a key to watch over the place when they were gone. He said that Daise could come and go without them knowing. Tr.p. 2059-2064. Similar testimony was presented by Asia Palmer. 2124-2125.

another person April 14, 2012 and was asked if he recalled signing a statement under oath. Simmons denied ever signing any statement. Tr.p. 2086, l. 1-7. Simmons also denied telling defense investigator Bobby Watkins (now deceased) that he had previously told the police that they had told him he had to go and talk with them and that they were trying to keep him as a witness so he would not be an accessory so he went and told them a story. Tr.p. 2086. However, he recalled telling Watkins that he had told the police that he had picked Earnest up because they were trying to make him an accessory because they had his text saying he would be there "but I never picked him up." Tr.p. 2096, l. 20- p. 2087, l. 3. Simmons responded and confirmed that this statement was the truth and was relay what happened. Tr.p. 2087. When confronted by the defense that this meant he did not pick up Daise, he asserted that he was being confused. Tr.p. 2087. When the portion of the Watkins statement was re-read to Simmons, he stated that he did tell Watkins that. Tr.[p. 2088, l. 1-9. However, when the defense then confronted with his testimony that he had dropped Daise off somewhere around Poppy Hill that evening he stated that was right. Tr.p. 2088, l. 9-15.[9]

The defense next asked Simmons what happened that date. In a series of leading questions, Simmons agreed that on November 15, 2009 he was home and planning to go to a four-wheel race after he got off work between 4 and 5 o'clock and Daise was home at that time. Tr.p. 2097- 98. He left to go to the track at Seabrook, but never got raced and went to Maryland

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[9] On cross-examination, Simmons confirmed that he told Watkins on April 14, 2012 that he had left Daise at his house and left for the race track at Seabrook and then left the track and went to Maryland Fried Chicken and while there got a text from Daise and the text asked him to pick him up and Simmons then texted Daise and told him he was on the way. Tr.p. 2088, l. 19- p. 2089, l. 8. Simmons also confirmed to the defense that he had told Watkins that when he left Maryland Fried Chicken he was looking for Daise but did not see him and one of the young guys in the area told him Daise was already at the race track. Tr.p. 2089, l. 8-17. Simmons further confirmed that he had told Watkins that he came home around 7 to 7:30 and dropped his girlfriend off at his mother's house and they were all standing around , including Daise. He confirmed he told Watkins that they went down to Eddie Simmons house and were there about 45 minutes and then he and Earnest went back to his house. Tr.p. 2089-90. However, Simmons though some of this portion of the Watkins statement were not in his words but in substance was correct. Tr.p. 2090.

Fried Chicken and while there got a text from Daise to pick him up and he texted back that he was on the way. Tr.p. 2098. He agreed that he came back home looking for Daise but did not see him. However, he did not recall the inquiry that after he left his house again on the way to the track, he received a call from his girlfriend who asked him to turn around and that he went home because he did not drop off Asia there because she had her own car. Tr.p. 2099, l. 1-14.

The defense returned to the Watkins statement and inquired whether Simmons told Watkins that he came back home around 7 to 7:30 after dropping off his girlfriend at his mom's house and that was when he saw Daise again. Tr.p. 2099. Although Simmons confirmed that he was standing around and went to Uncle Eddie's home and stayed about 45 minutes with Daise, he specifically denied that he went back to his house with Earnest. Tr.p. 2099-2100. When confronted with that portion of the Watkins statement, Simmons stated that this had occurred in the earlier part of the day. Tr.p. 2100, l. 1-20. However, when confronted with the portion of the statement setting a time frame at 7 to 7:30 when he came back, Simmons confirmed that that was what he told Watkins that date. Tr.p. 2101, l. 1-15.

On cross-examination, the defense also asked Simmons about his conversations with the deputies after the event. Tr.p. 2101. He confirmed that they had told him to come and talk with them and that they were trying to keep him as a witness and not an accessory after the fact. Tr.p, 2101. Simmons claimed that the police gave him a piece of paper and put it on the counter and said" you're going to tell me you picked him up" and they said "we got you in the text saying you came to pick him up." Tr. P. 2102, l. 1-11. However, he denied that he had picked up Daise, but confirmed that he claimed he told them that because he was threatened with being an accessory. Tr.p. 2102. He claimed that when they put him in the car and asked him where he picked him up he told them that he just picked him up off the main road. When

confronted whether it was true by the defense, Simmons stated "I gave him a ride to the store. Tr.p. 2103, l. 5. Then he recanted and claimed that he did not pick him up at all. Tr.p. 2103, l. 15-16.

On re-direct examination, Simmons was asked if what he had just said was the exact opposite of what he had testified on direct (pitting his direct against his cross-examination). Tr.p. 2104, l. 3-9. Simmons declared "no" that the defense was asking if that was what he told the officer that's after they came back with the text and that it was "at two different times" and that "you all are trying to confuse me with it." Tr.p. 2104, l. 9-15. He closed by confirming that he was friends with Daise and did not want to be here testifying. Tr.p. 2104, l. 14-21.

***The "Credibility" of the Initial Police Version Testimony of Sergeant Fraser***

The State called Staff Sergeant Jeremiah Fraser to testify about his interview with Simmons. Tr.p. 2107, l. 11-24. He stated that at the time Simmons had already talked with other officers. Pertinent to the issue the following occurred:

Q. Was the story that he gave to those officers credible?
A. No, it was not.
DEFENSE: Objection, your Honor.
THE COURT : Okay.
Q. Did you have information that led you to believe that those stories were not credible?
A. Yes, we did.
DEFENSE: Objection, your Honor.
THE COURT: Okay. Basis?
DEFENSE: He's asking him to comment on the testimony of another witness with respect to the witness's credibility.
SOLICITOR THORNTON: Your honor, the whole purpose of him testifying is to comment on the credibility.
THE COURT: Okay, Overruled, you can ask it ...
Q. Did you have information that made the stories of Jay Simmons seem not credible to you?
A. Yes, we did.
Q. Is that why you wanted to interview him again?
A. Yes, sir, that's correct.
Q. And did you interview him?

A. Yes.....

Tr.p. 2108 -p. 2109, l. 3.

***The Testimony about the November 18, 2009 Inconsistent Statement of Simmons***

Sergeant Fraser proceeded to testify that Simmons gave him two different versions of his interaction with Daise before and after he was confronted with the "on the way" text when the story changed. Tr.p. 2110-2111. Fraser testified that Simmons initially told them he had gotten home from work around 4:30 and Daise was there. Simmons told them that he left Daise and went to a race on Detour Road and then left and went to Maryland Fried Chicken near the sheriff's office. He stated that when he returned home that Daise was still there. Tr.p. 2100, l. 11-23. Simmons had denied to them that he had a cell phone. Tr.p. 2111. Fraser stated this denial changed when he was asked to come into the office while a search warrant was being executed at his while during the November 18 interview. When his cell phone was recovered and he was asked about the text to Earnest Daise's phone, the story changed. Tr.p. 2111, l. 7-24. Fraser testified that some of what he had said was true about when he got home from work and went to the race. Tr.p. 2112. However, he noted that while he was at the Maryland Fried Chicken he received a phone call from Daise asking him to pick him up. Fraser reported that Simmons stated he told him he's be on his way. He stated that Simmons told him after that he sent Daise a text that he was on the way and then picked up Daise in Dale. Tr.p. 2112.[10] [Sergeant Fraser stated that the Player Road area (where the crime happened) and Albany's Convenience Store where he picked him up was in Dale. Tr.p. 2112].

Fraser stated that Simmons told him that he had picked up Daise at Albany's Convenience Store (which is off Keans Road a short distance from Player Road). Fraser said

[10] As noted earlier, Simmons had denied on direct that he had spoken with Daise. In the Fraser version, they had a telephone conversation.

that Simmons told him that when he picked up Daise he seemed distraught and Simmons thought that Earnest had been robbed by the way he was acting. Tr.p. 2113, l. 1-7. Simmons said that Daise did not say anything to him on the ride home and that they stopped at Speedway where he got out and bought beer and returned while Daise remained in the car. Tr.p. 2113. He claimed he drove back top Simmons Poppy Hill trailer, but Daise did not go into the house and he dropped him off the road and Daise headed toward the railroad tracks. Tr.p. 2113, l. 12-17.

Simmons described to Fraser then returning to his home and receiving a telephone call from his cousin that a murder had happened and then received a second call from his girlfriend that the murder had occurred and he said that he had just realized that he may have picked up Daise after the murder. Tr.p. 2113, l. 21-25. During this interview, Simmons stated concern by repeating that he did not to be involved. Tr.p. 2114, l. 1-6. Fraser described after the interview that they went and he showed them where he picked up Daise which was at the intersection between Keans Neck and Porch's Hill Road. Sergeant Fraser stated the distance from there to the crime scene was 1.6 miles. Tr.p. 2114-15. It would be shorter by foot if a well-traveled trail was used. Tr.p. 2115. [11]

## ANALYSIS

The Appellant contends that the comment made by Fraser about the credibility of the original statement given by Simmons to law enforcement on November 15 compared to the November 18, 2009 statement by Simmons demands a new trial because witness credibility is in

[11] On cross-examination, it was developed that the first interview with Simmons was on November 15-16, 2009. Tr.p. 2116. Further it was stated that the search warrant was executed on November 18, 2009. Tr.p. 2117. Sergeant Fraser stated he was not aware what was seized other than the cell phone which concerned him in the interview. Tr.p. 2118, 2120. Sergeant Fraser stated that the first 45 minutes of his interview on November 18 was consistent with the substance of the earlier interview of Simmons. Tr.p. 2119. He stated that he had Investigator Heirs present because of his involvement in the first interview. Tr.p. 2119, l. 6-10. Sergeant Fraser testified that during the interview that he tried to explain with him all aspects of what was involved in the murder, including being an accessory after the fact and the hand of one hand of all in trying to express the seriousness of the charges, Sergeant Fraser confirmed that he told Simmons that he could be charged as an accessory after the fact. Tr.p. 2121.

the exclusive province of a jury and one witness is not allowed to testify whether another witness is telling the truth, citing State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). He equates the comments about why the investigation proceeded with another interview of the witness in 2009 with direct comments during a trial on why another witness is not lying or telling the truth such as direct witness "pitting."

Respondent respectfully submits that the testimony by Sergeant Fraser is misconstrued because it goes to why the investigation made additional inquiry of the state witness, not that the same witness's trial testimony was truthful or not truthful.[12] It is without challenge that the witness gave a series of inconsistent statements prior to the trial raising a question his credibility – this was brought out by the state and the defense in their examination of Simmons prior to Sergeant Fraser's testimony.

"The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App. 2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). See also SCRE Rule 608(a) (concerning opinion evidence about character for truthfulness or untruthfulness). The Court recognized that in Kromah related to an expert forensic interviewer that "it is improper for a

[12] Evidence that police began an investigation may be admissible pursuant to State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994); Rhodes v. State, 349 S.C. 25, 32, 561 S.E.2d 606, 610 (2002). The Court has held testimony concerning why an investigation or surveillance was undertaken was admissible. *See, e.g., State v. Green,* 318 S.C. 426, 458 S.E.2d 73 (Ct.App.1995) (in drug prosecution, testimony that officers were in the neighborhood where defendant was found because the officers had received complaints from residents concerning drug activity was not hearsay; the complaints were offered to explain why the officers were in the area stopping individuals and asking them for identification, not for the truth of the matter asserted). In State v. Johnson, 318 S.C. 194, 456 S.E.2d 442 (Ct.App.1995), the Court held that testimony referring to the area where the defendant's alleged drug transaction took place as a "high drug traffic area" was admissible as relevant evidence explaining why law enforcement was in that particular area, despite counsel's objection that the State was using the prior crimes of others to imply the defendant must also be a drug dealer In a case challenging similar testimony on the grounds of hearsay, our Supreme Court held that such testimony was "not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." State v. Brown, [317 S.C. 55], 451 S.E.2d 888 (1994) (citing United States v. Love, 767 F.2d 1052 (4th Cir.1985), *cert. denied,* 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 890 (1986)). Inferentially, the court recognized such testimony as relevant and admissible. See State v. Kirby, 325 S.C. 390, 395, 481 S.E.2d 150, 152 (Ct. App. 1996).

witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." Kromah, 401 S.C. at 358–59, 737 S.E.2d at 500 (citations omitted); State v. Brown, 411 S.C. 332, 343, 768 S.E.2d 246, 252 (Ct. App. 2015) (same). Further in a situation where a defendant is testifying and on cross-examination a pitting question is asked against the state's witnesses, the Court has consistently held "no matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper." State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994).[13]

Further, the "not credible" responses by Sergeant Fraser was not to the credibility or lack of it of the 2013 trial testimony of Jay Simmons (or to the Appellant). It was merely why the investigation in 2009 required an additional questioning of Simmons when he had declared that Daise was home the entire time on that date after 4:30. Although not stating why they questioned the initial statements made in 2009, Sergeant Fraser only declared to the jury that they had "information that made the [November 15, 2009] stories of Jay Simmons seem not credible to [him]" and that was "why [he] wanted to interview him again." Tr.p. 2108 -p. 2109, l. 3. Contrary to the current suggestion, Sergeant Fraser did not state that the ultimate versions Simmons gave on November 18, 2009 or his trial testimony or portion of it was "credible" or

[13] Unlike these cases, the defendant was not pitted against the state witnesses by questioning of the defendant. Here the state witness was pitted against himself by his inconsistent and statement history. This was not about the propriety of an assistant solicitor attacking the veracity of the defendant by pitting his testimony against that of a State's witness as in State v. Hariott, 210 S.C. 290, 42 S.E.2d 385 (1947). In Hariott, the solicitor forced the defendant to attack the veracity of the State's witness, a police officer. The court concluded that the improper questioning prejudiced the right of the defendant to a fair and impartial trial. In State v. Brown, 297 S.C. 27, 29, 374 S.E.2d 669, 670 (1988), the Court reversed a conviction because the assistant solicitor forced Brown to attack the veracity of the investigating officers by inquiring whether the officers "made the story up" about Brown's participation. The assistant solicitor compounded her error by challenging Brown that his "made up" story was "pretty convenient," which pitted his testimony another time against that of the officers and Brown's credibility was a crucial issue.

not.

Here, the witness's credibility was impeached throughout by the inconsistent statements he gave during his own trial testimony through both direct and cross-examination, independent of Sergeant Fraser's comment for the basis of his own actions in 2009. At no time did Sergeant Fraser say that Simmons trial testimony was credible or not credible. Rather he stated that actions that Fraser took in 2009 were based upon information they had that suggested Simmons initial version seemed to not be credible based upon their information. It cannot be disputed that during Simmons trial testimony he appeared to give vastly varying versions depending upon who was asking the questions, thus implicitly impeaching his credibility and bringing it solely to the jury to actually determine who was correct. Plainly, with Sergeant Fraser testifying about an inconsistent statement under Rule 613, SCRE, that portions that the witness denied in his direct examination raised the credibility issue. In their own cross-examination, Simmons testimony about earlier events varied from question to question. Thus, the comment would not have prejudicial impact in light of the entire record of the witnesses own inconsistencies.

Simply put, everyone in the courtroom questioned the credibility of Simmons's trial testimony, independent of the 2009 statements. The assertion by Fraser was clearly cumulative. Assuming arguendo it was "pitting", improper witness pitting "constitutes reversible error only if the accused is unfairly prejudiced" as a result of the pitting. "If it appears from the record that the conviction is clearly correct on the merits, that the accused had a fair trial, and that no other verdict could reasonably have been returned on the evidence, [an appellate court] is disposed to regard the [witness pitting] error as harmless." Thrift v. State, 302 S.C. 535, 538, 397 S.E.2d 523, 525 (1990); see also Smith, 230 S.C. at 168, 94 S.E.2d at 887 ("The burden is upon the appellant to satisfy [the appellate] court that there has been prejudicial error."). Even in cases

where witness pitting occurs, "[i]t is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947). See Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) ("[I]mproper pitting constitutes reversible error **only** if the accused if **unfairly prejudiced**." (emphasis added)). see also State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). As a result, any error that occurred was entirely harmless and did not warrant the reversal of Appellant's conviction. See United States v. Hastings, 461 U.S. 499, 509 (1983) ("[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]").

## III. The trial judge did not abuse her discretion in admitting evidence from Jeanine Mullen's best friend that the victim was terribly afraid of appellant as state of mind within the court's mandates of State v. Garcia and State v. Weston as relevant evidence where the state of their relationship was at issue. Harmless error further would be shown where there was probative evidence that the Appellant had made a direct threat to the victim to kill the victim and her family prior to the incident.

Jeanine Mullen's father and best friend Alleen Porter each testified in part that Jeanine was afraid of her boyfriend Earnest Daise and was breaking off the relationship. The Appellant only challenges in the appeal the testimony by Porter that the victim was "terribly afraid" of Appellant. The trial judge found that this limited testimony met with the mandates of the Court for the admission of fear by the victim citing State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999), that it was relevant and was not prejudicial. Respondent submits that the trial court did not abuse its discretion. Further, in light of evidence from the Appellant about express intent to

kill and malice against the Appellant and her children, any possible error is harmless.

**Standard of Review**

In criminal cases, the appellate court sits to review errors of law only. State v. Johnson, 413 S.C. 458, 776 S.E.2d 367, 371 (2015). The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

All relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct.App.2002); see also Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct.App.2013) (internal quotation marks omitted). See State v. Bratschi, 413 S.C. 97, 114-15, 775 S.E.2d 39, 48-66 (Ct. App. 2015).

***Admissibility of Victim's Fear Evidence***

Relevant are the decisions of the South Carolina Supreme Court in 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). In Weston, the Court stated that in Garcia: "We held, "the victim's state of mind-that she was scared of appellant-was relevant because it tended to disprove appellant's contention the shooting was an accident; the victim's fear suggests appellant may have intended the shooting." State v. Weston, 367 S.C. 279, 287-288, 625 S.E.2d 641, 645 - 646 (2006).

**HOW THIS ISSUE WAS RAISED**

During the trial, there was a motion *in limine* concerning evidence about the relationship between Jeanine Mullen and the Appellant. Tr.p. 1842-1922. During the proffer of Alleen Porter, she testified about her friendship with the victim and knowledge of the victim's fear of Daise. Tr.p. 1901-1922. She described her advice to Jeanine because she became aware that Jeanine was terrified of Daise and desired to break off their relationship. Tr.p. 1908. Porter testified they developed a safety plan and that the plan was not used the night of Mullen's death. Tr.p. 1909. She stated that she was aware it was one of her son's birthdays that day and that there were plans to meet at Applebee's but she never received a call. Tr.p. 1909-1910. She testified on cross-examination during the proffer about an occasion when she overheard some arguments between Daise and Jeanine because the telephone was not hung up after a call. Tr.p. 1919-1920.

After the proffered testimony, Solicitor Stone stated that he sought to introduce the testimony from Ms. Porter to show first, that Jeanine was afraid of Daise, second, that they had a safety plan because of it, third, that she said she was going to leave him within a 2 week window and fourth, the direct threat that Earnest Daise made that he would kill her and her children. Tr.p. 1924, l. 2-11.

The next morning, Judge Mullen advised the parties about a series of case citations concerning material she had reviewed on the rulings. Tr.p. 1931-1932. Particularly as to Alleen

Porter's potential testimony, Judge Mullen concluded:

> As to Alleen Elaine Porter, first off, that Jeanine was afraid of him, I think that, again, that would go under an exception of the hearsay rule, under the present sense impression, provided it was very close in time to the actual shooting, not over time, but close in time. Again, I think that falls under *Garcia*, as that she had a safety plan.
>
> I heard her testimony to be: *We pretty much watch out for each other; we both live in rural areas; and we were taking care of each other during the dark.*
>
> I don't know if it would be specifically directed as to, say, Mr. Daise being the aggressor, but just, *we watched out for each other*, I don't see any prejudice in that. I think definitely her testimony that, within, you know, a few days when she was taking this University of Phoenix programs and that she intended on leaving him; that she was getting her life together; and I think that clearly goes to motive and his motive to kill her and the allegation that this was somehow retaliation for her trying to leave him. And if she can testify as to that, and it had to be very close in time, I think that's allowed. I think it's permissible.
>
> The direct threat of, you know, I'm going to kill you, I believe the testimony was they had some kind of over-the-phone of, you don't know -- and *she said, you don't know me; he says, you don't know me; I will kill you and your kids*, I think, under State v. Blakely,[14] it's well settled that evidence of previous threats is admissible to show the malice. I can't find anything that doesn't allow it. Quite frankly, it's his statement, you know, it's his admission. And so, I don't see, in that context, where that wouldn't be permissible.

Tr.p. 1935, l. 9 – p. 1936, l. 17.

Counsel McGuire reopened the issue concerning evidence that Mullen was afraid of Daise. Tr.p. 1942. He contended that the objection was based upon a Rule 403 analysis and "while it could have some relevance" and it evidenced an intent to kill in most of the cases and that such testimony went to refute a claim of self-defense.

Judge Mullen noted that it fell squarely under State v. Garcia .and that the witness could testify that the victim was afraid of Daise under the hearsay exception and that it is limited in time to recently before. Tr.p. 1943, l. 7-20. She opined that the witness could not testify as to the specifics as to why the victim was afraid of him. Judge Mullen stated that even with the totality of the four witnesses testimony (including Frank Mullen, Porter, and the two children)

[14] Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004).

"even the totality of it, with all that combined, it's not cumulative and I don't think its prejudicial." Tr.p. 1943, l. 15-20.

***The Testimony at Trial***

In front of the jury, Alleen Porter testified briefly about her relationship with victim Jeanine Mullen. Tr.p. 2007-2010. Porter testified that she had a very close relationship with the victim and considered that she was her best friend. Porter stated that it was Mullen's intention to dissolve the relationship with Daise and to enroll to get a degree in elementary education. Tr. 2008-2009. When asked if she had any particular feelings towards the Daise and if she was afraid of him, Mullen answered: **"terribly afraid."** Tr.p. 2008, l. 23- p. 2009, l. 1.[15]

Porter also described hearing an argument while she was on the telephone with Mullen after Mullen failed to hang up the telephone after Porter's conversation ended. The victim and Daise were arguing with profanities. Porter heard Daise tell Jeanine Mullen:

> "Bitch, you don't know who you're messing with. I will fuck you and your kids up. I will kill you. I will kill you and your kids" or something to that effect.

Tr.p. 2010, l. 2-6. Porter testified the argument continued and she eventually hung up the telephone. Tr.p. 2010, l. 6-9.[16]

**ANALYSIS**

Rule 803(3) allows hearsay testimony if the testimony is in the form of a statement as to

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[15] Frank Mullen, the victim's father had testified before Alleen Porter. Tr.p. 1979-1996. Like Porter, he testified his daughter could not deal with Daise anymore and that she was afraid of him. In addition, he testified that she told him around that weekend that she was going to get rid of him and go back to school. Tr.p. 1995-1996.

[16] In the state's guilt phase closing argument, Solicitor Stone did not specifically reference the testimony about Jeanine Mullen being "terribly afraid" but did state that she had moments of clarity that she shared with family and friends that she knew she was afraid and that she was done with him. Tr,p, 2455. See Tr.p. 2455-2472. However, he then referred to the contrasting message presented by the defense (Defense Exhibit 15 – text messages) to suggest that she wanted friendship from him and that it revealed that he wanted her as property. In the defense closing, the defense used the same exhibit to suggest that there was a volatile relationship, but the messages revealed an intimate relationship at the time. Tr.p. 2481, 2483- p. 2484, l. 13. More precisely, defense counsel urged that "they want you to believe that Jeanine was afraid of Earnest" and urged the jury to read Defense Exhibit 15 and characterized it as "this is not a woman who is afraid, or a man suggesting he's unhappy to be in her company." Tr.p. 2490, l. 4-8.

the declarant's then existing state of mind or emotions; the rule excludes the testimony, however, if it is purely a recitation of facts. SCRE 803(3).[17] The rationale for Rule 803(3) has been explained as follows:

> [T]here is a fair necessity, for lack of other better evidence, for resorting to a person's own contemporary statements of his mental or physical condition" and that such statements are more trustworthy than the declarant's in-court testimony. Mere statements of fact, however, are provable by other means and they are not inherently trustworthy.

State v. Hardy, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994) (quoting 6 John H. Wigmore, Evidence § 1714 (1976)). Statements of emotion include, for example, "I'm frightened" or "I'm angry." Id.[18] Courts have further clarified that testimony that recites *both emotions and facts* falls within the scope of the 803(3) exception. State v. Marecek, 130 N.C.App. 303, 306, 502 S.E.2d 634, 636 (1998). This is because "factual circumstances surrounding [the declarant's] statements of emotion serve only to demonstrate the basis for the emotions." State v. Gray, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997).[19] Courts have created a sort of trichotomy in applying Rule 803(3). Statements that recite only emotions are admissible under the exception; statements that recite emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception.

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[17] SCRE Rule 803 (3) does not exclude as hearsay the following:

**(3) Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

[18] See also cases collected in Jay M. Zitter, Annotation, *Admissibility of evidence of declarant's then-existing mental, emotional, or physical condition, under Rule 803(3) of Uniform Rules of Evidence and similar formulations,* 57 A.L.R.5th 141 (1998), § 3[a] ("*Showing fear of defendant or accomplices harming victim or family—Statement held admissible under Rule 803(3)*").

[19] The court in State v. Gray, supra., held that the victim's statements that she was afraid for her life and factual circumstances surrounding such statements were admissible in a capital-murder prosecution under the state-of-mind exception to the hearsay rule, Rule 803(3) and distinguished State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994).

In South Carolina, the Weston and Garcia opinions illustrate our courts approach. Particularly in Weston, the Court rejected the assertion that Rule 803(3) and Garcia require a holding that a witness may testify to the fact that the decedent was afraid, but not that the decedent was afraid of the defendant. Instead, the decision in Weston held **that "the victim's state of mind-that she was scared of appellant-was relevant ..."** and evidence about the victim's state of mind to not touch anything because the victim was afraid of the defendant and was more nervous and anxious. Weston, 367 S.C. at 288287088, 625 S.E.2d at 646. In Garcia, the Court found error in the admission of evidence beyond that the victim had fear which included evidence that the victim had told her grandmother that the defendant had kicked her causing a bruise and that the defendant had told the victim that if she ever left him that he would kill her. The Court held that the *reason* for the declarant's state of mind was not admissible.[20] Applying Rule 803(3) in Weston, the Court held that the State was properly allowed to present evidence testimony that the victim, Weston's mother, was afraid of Weston because this testimony did not give a reason for the victim's fear where the victim's body had never been found. Id at 287-88, 625 S.E.2d at 645-46.8

Here, no hearsay evidence of the particular "reason" why Jeanine was "terribly afraid" was admitted. Instead, other than an unchallenged declaration against interest by Appellant, the only evidence presented was Jeanine Mullen's being terribly afraid to support the relevant evidence that she intended to end the relationship with Appellant. See State v. Simko, 71 Ohio

[20] In Garcia, the Court explained that statements concerning the victim's state of mind under Rule 803(3)"are considered trustworthy because 'they are based on unique perception; that is, the declarant has a unique perspective into [her] own feelings and emotions.' . . . Statements may either directly or circumstantially show the declarant's state of mind, emotion, or physical condition." 334 S.C. at 75-76, 512 S.E.2d at 509 (citations omitted).

St. 3d 483, 644 N.E.2d 345 (1994).[21] The reasons for those fears and concerns were not admitted - just the fear itself. The State did not introduce or seek to introduce the basis - reason - for the belief which were witnessed by Porter concerning alleged injuries and statements by Jeanine as to the reason for her fears.

Here, there was no hearsay evidence presented about other acts of Earnest Daise that caused the particular fears that the victim had. Instead, the evidence was only that she was going to end the relationship and of being afraid of Appellant. Under Rule 803(3), through Garcia and Weston, this limited evidence of being afraid was admissible as "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." Further in Weston, the case involved a victim who was never found. Here, the victim was found. The fear evidence contrasted and placed in context the existing nature of their relationship, especially probative in light of the inconsistent text messages.

***The Probative Value of the "Terribly Afraid"Evidence Was Not Substantially Outweighed By Danger of Unfair Prejudice.***

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. The question then should be limited to whether the prejudicial value substantially outweighs the probative value. Plainly the probative value outweighed the prejudicial effect. During the case, the defense put into evidence

[21] In State v. Simko, 71 Ohio St. 3d 483, 644 N.E.2d 345 (1994), a prosecution for murder and related crimes, the court held that the trial court did not err in allowing the testimony of a long-time friend of the victim that she was with the victim the night before her death and that the victim told the witness that she was "really scared" of the appellant. The court explained that Ohio Evid.R. 803(3), the state-of-mind exception to the hearsay rule, allows evidence that the declarant was afraid but does not allow as evidence the reasons why the declarant was afraid, so that this testimony was, therefore, admissible under the hearsay exception. Additionally, the court reasoned, the testimony was arguably relevant and therefore admissible to the question whether the appellant was distraught or was following the victim the night before her kidnapping and murder and to the issue of prior calculation and design. Moreover, the court added, any error in admitting the testimony was harmless beyond a reasonable doubt and, given the weight of evidence against the appellant, there was no reasonable possibility that any evidence violation contributed to the appellant's conviction.

a series of text messages to reflect the relationship with Appellant was on-going, although it was tumultuous. See Defense Exhibit 15. Tr.p. 2231. Also, Tr.p. 2481, 2490 (defense Closing Argument Comments on the Text Messages Between Daise and the Victim). Cumulative evidence from the victim's father was also presented without objection that his daughter intended to leave the Appellant, in addition to being afraid of him. Tr.p. 1995. This reflected the proper course of their relationship and modified his position that he was her boyfriend.

**Any Error in the Admission of the Victim Being "Terribly Afraid" Was Harmless in Light of the Appellant's Admitted Statement of Threatening to Kill the Victim And Her Family.**

Assuming the admission of the evidence was improperly admitted, any error in its admission was harmless. The challenged evidence only goes to victim state of mind as being "terribly afraid" of the Appellant. Whether an error is harmless depends on the circumstances of the particular case. *See* State v. Page, 378 S.C. 476, 483-84, 663 S.E.2d 357, 360 (Ct.App.2008). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). In considering whether error is harmless, a case's particular facts must be considered along with various factors including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. State v. Page, supra.

The general comment about the victim being terribly afraid has limited prejudicial effect. First the trial judge recognized this in her assessment. Tr.p. 1943. Further, the unchallenged in the appeal and properly admitted evidence of Appellant's expressed malice toward the victim

and her family and specific intent to kill makes the limited testimony if error, harmless error. The Appellant's statement that ""Bitch, you don't know who you're messing with. I will fuck you and your kids up. I will kill you. I will kill you and your kids," (Tr.p. 2010, l. 2-6) cures any potential error concerning the victim being terribly afraid.[22] State v. Sweat, 362 S.C. 117, 132, 606 S.E.2d 508, 516 (Ct.App.2004) ("The determination of prejudice depends upon the unique circumstances of each case.").

Further, the Appellant is not challenging on appeal the admission of similar evidence from the victim's father that his daughter was afraid of the Appellant. Tr.p. 1995, l. 23- p. 1996, l. 3. This failure to challenge similar evidence should act as a waiver in this appeal as to the Porter comment on "terribly afraid" when the father's earlier testimony about the victim's fear of Daise is not raised. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (same); State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (same).

In addition, harmless error from the "terribly afraid" comment exists due the the strength of the inculpatory evidence presented against Daise. The Appellant's blood was found on the doorframe of the room at the Simmons trailer, his blood and Jeanine's blood were found on the jeans he was wearing that day, and there was a fresh cut on his hand the night of his

[22] This statement by Earnest Daise was admissible as non-hearsay under SCRE Rule 801(d)(2) as an admission by a party opponent. Under Rule 801(d)(2), SCRE, an admission by a party-opponent is not hearsay "if the statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity ..." Accordingly, appellant's earlier statement heard by the witness was not hearsay pursuant to Rule 801(d)(2) and the trial court did not err in admitting it. State v. Tucker, 334 S.C. 1, 12-13, 512 S.E.2d 99, 105 (1999). This was admissible evidence of the prior direct threat against the victim and shows motive, identity and intent to kill. See *Blakely v. State,* 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) (holding evidence of prior threats against a defendant's girlfriend was admissible to show intent); *State v. Atkins,* 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990) (finding evidence of a defendant's prior difficulties with a victim's family concerning racial differences was relevant to prove motive); *State v. Plyler,* 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980) (holding evidence of a verbal argument between the defendant and victim that occurred three days before the murder was admissible to show motive). There is no issue presented in the appeal challenging the introduction of Daise's statement of intent and express malice.

arrest. The surviving child's commented that "Daddy" did it. There were texts between the Appellant and the victim reflecting the ongoing problems in their relationship and the reference to the Appellant as "E-dub" or Dub (Defense Exhibit 15) or "E" (Tr.p. 1993) to explain the child's comments to the paramedics. Appellant made false statements that he was not at the home the prior day ( Tr.p. 2002-03) and proven false statements that he was not in the white van that date when a photograph shows he had the van at the Dobbs B.P. gas station that day, (2018-19, 2021), Appellant also made malicious comments to the victim around the time she was trying to get the van back on the telephone stating: "who the fuck do you think you are talking to" (that Michael Wilson overheard while the Appellant was at Eddie's Disco at dusk the day of the murder) (Tr.p. 2024, l. 9-11), There was evidence that Daise was picked up by Simmons that day in an area Appellant had falsely claimed to law enforcement he had not been. Further, there was no evidence of a forced entry into the victim's home and nothing was stolen counteracting the defense suggestion that there had been burglaries in the area. Finally, there was the failure of the Appellant to attend to his wounded child at the hospital.

Respondent respectfully submits that a new trial is not warranted by this admissible evidence.

**IV. When Appellant made no motion pursuant to Batson v. Kentucky, 476 U.S. 79 (1986) after jury selection, any issue concerning the quashing of the pre-trial on jury training materials is moot and a new trial is not appropriate as a remedy. Further, the trial judge did not err or abuse her discretion in quashing the pretrial subpoenas *duces tecum* to the Solicitor's Office and Office of Prosecution Coordination to produce "all documents regarding jury selection, including but not limited to training documents, training agenda, manuals, policy statements or advisements and correspondence with current or former prosecutors and circuit court judges" where the information was not relevant to the guilt or innocence of the Appellant and there was no statute or court rule authorizing such discovery in a criminal case.**

The underlying issues are simple. Can a criminal defendant prior to trial through a pre-trial subpoena pursuant to South Carolina Rule of Criminal Procedure Rule 13 acquire the potential general prosecution strategy in the trial of a case and selection of jury through the mandatory disclosure of work product strategies expressed in prosecution training seminars and materials. Asserting basic "work product" principles, the Solicitor and Commission on Prosecution Coordination asserted that this was a misuse of subpoenas in criminal cases because it was not material to merits of the criminal case and went solely to their "work product." The trial judge agreed.

More importantly, the defense prior to the trial suggested that it needed the particular work product training and strategy materials related to jury selection to bolster their potential argument when the prosecutor struck an African American juror as violation of Batson. However, the defense never subsequently made a Batson motion after the jury selection. Thus, any claim deprivation in not having the material was removed because the failure to seek explanations by the prosecutor indicated a belief by the defense that the State did not use any of its peremptory challenges in a racially discriminatory manner. To suggest entitlement to a new trial merely because training and materials agendas were not provided is without merit. The failure to disclose had no effect on the trial.

Finally, it is important to note the conclusion of Judge Mullen, an experienced trial judge in the circuit who views the actions of the Fourteenth Circuit Solicitor's Office daily and aware of the intended concerns expressed by the defense concerning it proffered use in the Batson setting after her *ex parte in camera* review of the sealed materials from the prosecution: "[U]pon review, the materials do not include any abusive instructions or teaching materials, nor use of improper technique." *Order : Subject: RE: "Outstanding Daise Motions" by Email from Law*

*Clerk to all counsel; Tuesday, October 08, 2013 9:45 AM.* (emphasis added). ROA _.

It cannot be reasonably argued that prosecution training materials and seminars on how to try and strategize a case are not "work product." Plainly, these materials are to prepare strategy for future litigation. See Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) [23] In his argument, the Appellant has not suggested otherwise. However, he claims he essentially wants the training materials prior to the trial because he wants to know the strategy. This is not evidence in the case and disclosure under Rule 13 or compulsory process under the 6th Amendment is not appropriate. No new trial is warranted by the quashed subpoena when it was not sought in any motion for new trial. See Tr.p. 2525. ; Motion for New trial. ROA _. Order Denying Motion for New Trial , ROA _ .

Because the trial judge did not abuse her discretion, the subpoena was properly quashed. The decision did not deny the Appellant a fundamentally fair trial. In fact, it had no effect on the trial in any manner!

**HOW THE ISSUE WAS PRESENTED BELOW**

On October 4, 2013, by written motion, the Office of Prosecution Coordination and the Solicitors Office moved to quash subpoenas duces tecum directing them to produce "**all documents regarding jury selection, including but not limited to training documents, training agenda, manuals, policy statements or advisements and correspondence with current or former prosecutors and circuit court judges.**" *Notice of Motion and Motion to*

[23] "The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party." Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010); see Rule 26(b)(3), SCRCP (stating, "a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). "Generally, in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation." Tobaccoville, 387 S.C. at 294, 692 S.E.2d at 530.

*Quash Subpoena filed October 7, 2013 (filed by Amie Clifford, SC Office of Prosecution Coordination.* ROA _ . The motion was argued on October 7, 2013 at the pre-trial hearing. Pretrial Tr. pp. 8-51.

Movants South Carolina Office of Prosecution Coordination with the 14th Circuit Solicitor's Office submitted for *ex parte in camera* review pursuant to the subpoena 1022 pages of training materials it had accumulated on jury selection material from its training seminars for state prosecutors. Pretrial Tr.p. 23 -24. (Sealed Court Exhibit One [Pretrial Tr.p. 51]).[24] Education Director Clifford stated if someone was teaching at their seminars a matter unethically and/or says something wrong "we try to correct it." Pretrial Tr.p. 49, l. 12-16. While stating the work-product position was very important to the training commission, as well as the proprietary (and copyright interests of the presenters) she opined "first of all, I don't think there's going to be anything here that can help him (Daise and the defense team) one way or the other." Pretrial Tr.p. 49. Deputy Solicitor Thornton stated that these materials were "work product" and involved strategy. He stated that it was a backdoor attempt to get someone else's playbook and had nothing to do with the lawyers in this case. Pretrial Tr.p. 47-48.

The defense urged its basis for the request was to use the materials in anticipation of a challenge pursuant to Batson v. Kentucky. The defense speculated the materials would help demonstrate the pattern of the striking African American jurors in Beaufort County "and explain the intent behind the solicitor's action during jury selection and "the handbook is therefore necessary and material." Initial Brief of Appellant, p. 15.[25] Counsel McGuire asserted that the

[24] Counsel for the Prosecution Coordination Commission also stated that a computer search of its records revealed no emails to prosecutors or judges seeking jury selection advice. Pretrial Tr. P. 11. L. 9-18. However, the Commission asserted that even if there was some with other prosecutors, it would be considered as attorney work product and covered by the privilege. Id. See also, Pretrial Tr.p. 33, l. 17-p. 34, l.7.

[25] The reference by Appellant in his brief and below to a so-called handbook is speculative and confusing. At the hearing neither Commission nor the Fourteenth Circuit Solicitor confirmed that there was a "handbook." Rather, the proffered materials included agendas from the 46 seminars since around 2003 to the present that concerned jury

subpoena was necessary because if he tried to make a Batson argument after the state struck a black juror he would have the training materials to buttress his argument that it violated Batson. Pretrial Tr.p. 45. [26]

On October 8, 2013, Judge Mullen, through an email to all counsel entered a ruling on the motion. In particular, the trial court concluded:

> 1) The State's Motion to Quash Subpoena, heard Monday, October 7, is granted. While Defense counsel alleges that the State's prosecutorial training materials may tend to show methods of navigating around a Batson motion, an in camera review failed to show any such abuse. Upon review, the materials do not include any abusive instructions or teaching materials, nor use of improper technique. Additionally, the documents are generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trial. **The documents will be sealed and made part of the record available for appellate purposes.**

*Order : Subject: RE: "Outstanding Daise Motions" by Email from Law Clerk to all counsel; Tuesday, October 08, 2013 9:45 AM.* (emphasis added). ROA _.

The trial court began jury selection on October 8, 2013. After voir dire was completed, actual jury selection occurred on October 14, 2013. Tr.p. 1652-1659. The prosecution struck jurors 1, 14, 17, 26 and 34. The defense and the State both announced that there were no additional matters of law that needed to be addressed. Tr.p. 1660. Also 1667-1668. At that point, defense counsel McGuire announced his decision to not raise a Batson motion challenging in any manner the state's use of its peremptory challenges:

> Mr. McGuire: ...And the only thing I would add for the record for appellate purposes, **we didn't file a Batson motion. We didn't raise a**

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selection. Pretrial Tr.p. 32. Counsel Clifford stated that there was a Prosecutor's Deskbook originally made by the 15th Judicial Circuit that was picked up by the Prosecution Coordination Office in which they had done two versions. She stated that the Prosecution Commission also had a so-called "Boot Camp Manual" with the Boot Camp training program (for new prosecutors). Pretrial Tr.p. 33, l. 15-17.

[26] Counsel McGuire conceded that he was aware that some materials had been disclosed to another defense attorney, Elizabeth Franklin Best pursuant to a Freedom of Information Act but asserted that he had not seen the particular material that was disclosed to her. He declared that he wanted to do it under the Sixth Amendment right to compulsory subpoena process so it would be an appellate issue if denied. Pretrial Tr.p. 14 - p. 15, l. 1-6.

> **Batson challenge**, and I don't believe we have to renew our objections to the jurors that came up. We did use all out strikes. I think we'll probably reserve for the record regarding any voir dire issues or mitigation or impairment . . .or anything along that vein.

Tr.p. 1669, l. 24- p. 1670, l. 6.[27]

**ANALYSIS**

Although Appellant expressly failed to make a so-called Batson motion to determine the basis for the State's use of any of his peremptory challenges contemporaneously at trial and whether any of them violated the mandates of Batson v. Kentucky, the Appellant, for the first time, asserts that he is entitled to a new trial. Here, no showing or attempt at a showing was made that any of underlying and unstated reasons for any of the prosecution's challenges violated Batson or that the defense was dissatisfied with the jury actually chosen. Rather he belatedly seeks a blind windfall without any proof of discriminatory intent by the prosecution. The failure to make an argument that Batson was violated by any of the strikes must make the challenge to the earlier request for training materials moot.

His request for a new trial based upon the pre-trial quashing of the subpoenas is not preserved. At no time before the trial court did he request a new trial based upon this assertion. An issue not ruled upon by the trial judge is not preserved for appeal. I'On v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating parties should raise all necessary issues and arguments to the trial court and attempt to obtain a ruling). This is even more evident because no Batson challenge was ever made concerning any juror struck by the prosecution.

Under Batson, when one party strikes a member of a cognizable racial group or gender,

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[27] In the Initial Brief of Appellant, p. 15, Appellant asserted "Appellant never made a Batson challenge because he did not possess the handbook on jury selection" citing Tr. 1670, l. 1-4. This is a misstatement of the record. At no time did any counsel assert that they failed to make a Batson motion because of the quashing of the subpoena or not being provided a so-called "handbook." To the contrary, the reason was silent. It is as likely that the record was clear that the prosecution did not use its peremptory challenges in an improper way leading to a decision to not seek a determination under Batson.

the trial court must hold a Batson hearing if the opposing party requests one. State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999). In State v. Giles, the Supreme Court explained the proper procedure for a Batson hearing:

> First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination.

State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted).See State v. Stewart, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015), reh'g denied (Aug. 20, 2015). His suggestion that he is entitled to a new trial *de novo* when he made no attempt to suggest that Batson was violated in any manner by the prosecution in the particular strikes in this case must be deemed a waiver of the request.

The Appellant belatedly attempts to draw support from the decision in Miller-El v. Dredtke, 545 U.S. 231 (1985). In Miller-El , the Supreme Court held that the state court's findings as to the nonpretextual reasons for the prosecution's use of the peremptory challenges to exclude 10 of 11 Black venirepersons was shown to be wrong by requisite clear and convincing evidence, including comparative analysis between the treatment of white and Black jurors in the questioning and selection in the particular case in addition to supportive evidence from former prosecutors about the practice to systematically exclude Blacks from the jury. However, unlike the defendant in Miller-El, Daise's defense team never claimed any of the peremptory challenge by the Solicitor to any of the venirepersons was racially based and the State was never asked to explain its reasoning for the strikes in his case.

Recently, a similar subpoena issue concerning jury selection training notes was addressed by the federal district court in Howard v. Horn, 56 F. Supp. 3d 709, 723-24 (E.D. Pa.

2014). Therein, the District Court stated:

> Petitioner also claims that evidence of a "culture of discrimination" within the Philadelphia District Attorney's Office supports his *Batson* claim. In particular, Petitioner references a training tape made in 1987 by former Assistant District Attorney Jack McMahon in which he encourages picking non-African-American jurors. Mem. Supp. Habeas Pet. 32–33, ECF No. 58. **Petitioner also points to the notes of Assistant District Attorney Gavin Lentz, which were taken during a jury selection training by Director of Training Bruce Sagel in August of 1990. *Id.* at 34–35. As Judge Sitarski observes, however, the tape and lecture are "no substitute for the 'concrete, case specific information that is necessary to demonstrate a prima facie *Batson* violation.'** " R & R 29, ECF No. 84 (quoting *Lewis,* 581 F.3d at 104); *see also* Peterkin v. Horn, 988 F.Supp. 534, 540–41 (E.D.Pa.1997) (finding that the McMahon tape did not suffice to raise inference of discrimination).
>
> Courts in this District have recognized that "discriminatory intent cannot be inferred from the mere existence of the training video"; where the prosecutor at issue was not involved in the lecture or tape, "the courts have required some evidence of a link between that attorney and the tape." Rollins v. Horn, No. 00–1288, 2006 WL 2504307, at *4 (E.D.Pa. Aug. 17, 2006). Petitioner has not presented any facts that support any direct link between the prosecutor in his case and the training video, nor has he shown anything suggesting that the prosecutor in his case was aware of or attended the alleged lecture. **Accordingly, as with Petitioner's proffered statistical evidence, the mere existence of the video and lecture is not sufficient to make out a prima facie *Batson* claim.**

Howard v. Horn, 56 F. Supp. 3d 709, 723-24 (E.D. Pa. 2014) (emphasis added). See also, Bond v. Beard, 539 F.3d 256 (3rd Cir. 2008).

The Fourth Circuit has upheld a federal district court's refusal to require disclosure of certain matters including "any materials related to training and instruction given to attorneys in the United States Attorneys Office for the Western District of North Carolina related to jury selection." Barnette v. United States, No. 3:12CV327-V, 2014 WL 234817, at *4 (W.D.N.C. Jan. 22, 2014). See U.S v. Barnette, 644 F.3d 192 (4th Cir. 2011). The Fourth Circuit affirmed, finding "no merit in [Petitioner's] contentions that the district court committed prejudicial error in the manner in which it conducted the proceedings [on remand] or in its findings of fact and legal conclusions on the merits of [Petitioner's] Batson claims." Barnette III, 644 F.3d at 196.

Specifically, the Fourth Circuit held that the District Court did not err in refusing to order disclosure of the prosecutors' copies of juror questionnaires, with accompanying notes. Id. at 209, 211 (noting that Petitioner "was no more entitled to examine the work product of his trial prosecutors during the hearing on remand than he would have been (had he asked to do so) at the initial Batson hearing in 2002"). See United States v. Harbin, 250 F.3d 532, 542 (7th Cir. 2001) (citing United States v. Olano, 507 U.S. 725, 734 (1993).

The trial court's pretrial ruling quashing the subpoena was not error. Judge Mullen based her granting the motion to quash the subpoenas on the fact she determined that while the defense alleged that the State's prosecutorial training materials may tend to show methods of navigating around a Batson motion, the trial judge's *in camera* review failed to show any such abuse. Judge Mullen determined that the materials did not include any abusive instructions or teaching materials, nor use of improper technique. Additionally, the trial court found that the documents are generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trials.

Additionally, the State and the Office of Prosecution Coordination asserted that "there is no general constitutional right to discovery in a criminal case" citing Weatherford v. Bursey, 429 U.S. 545 (1977). No right to discovery exists in a criminal case absent statute or court rule. Because there is no statute or court rule requiring a disclosure of this information, the trial judge did not abuse his discretion in granting the motion to quash. See State v. Childs, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989). The state court rule concerning discovery in a criminal case would further suggest that disclosure was not required and the subpoenas were properly quashed. Rule 5(a)(2), SCRCrimP, exempts from discovery work product, or "internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection

with the investigation or prosecution of the case ...." The quashed subpoena commanded production of "[a]ll documents regarding jury selection, including but not limited to training documents, training agendas, manuals, policy statements or advisements, correspondence with current or former prosecutors and circuit court judges." To the extent that any attorney working for the Commission advises or corresponds with prosecutors about legal issues involved in the prosecutors' cases, such communication should be protected by the work product doctrine. The subpoena thus purported to require disclosure of privileged or otherwise protected matters, and was properly quashed. See State v. Myers, 359 S.C. 40, 596 S.E.2d 488, 492-493 (2004) (Supreme Court upheld trial court's denial of access to defendant to letter because letter contained communication between the Solicitor's Office and police department about the specific case and was thus protected by the work product doctrine).

Alternately, the prior training and CLE materials generally concerning jury selection could not contain any evidentiary impeachment or exculpatory evidence because there is no suggestion that they were specifically related to Mr. Daise's crime. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Under the Appellant's theory, they would be entitled pursuant to a subpoena to collect all CLE materials presented to any attorney within an prosecutor's office whether or not the attorney ever read or even attended the seminar. A similar argument was rejected in Commonwealth v. Gibson, 597 Pa. 402, 951 A.2d 1110 (Pa. 2008). There, the state court addressed that post-conviction revelation of the existence of an instructional video concerning the practice of peremptory strikes in an alleged discriminatory manner and concluded it did not constitute discovery of new evidence to allow it to relitigate defendant's Batson claim which

had been raised at trial and in a direct appeal.[28]

The Appellant contends his "right to compulsory process" should allow this disclosure of work product for jury selection materials unrelated to guilt, innocence or mitigation pursuant to the pre-trial discovery subpoena. He is mistaken about the purpose of subpoenas in criminal cases. To protect the right of criminal defendants to fair and impartial trials, the federal and state constitutions guarantee certain rights. Chief among them is the right to present witnesses and evidence in favor of the defendant. Article I, Section 14, of the South Carolina Constitution provides: The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. (Emphasis added.) This constitutional right of a criminal defendant to compulsory process for obtaining witnesses has been affirmed by the South Carolina Legislature. See S.C. Code Ann. §§ 17-23-60 ("Every person accused shall, at his trial, be allowed to be heard by counsel, may defend himself and shall have a right to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face."); and § 19-7-60 ("In all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor. The compulsory process shall be in misdemeanors a subpoena under the official signature of the clerk of the court or other judicial officer. Such subpoena or a

[28] See David C. Baldus, et al., Racial Discrimination and the Death Penalty in the Post–Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L.Rev. 1638 (1998). In Gibson, the Pennsylvania defendant relied on the so-called "McMahon tape," a 1987 videotape in which a Philadelphia assistant district attorney described his views on jury selection, which revealed a policy of racial discrimination. See Commonwealth v. Wharton, 571 Pa. 85, 811 A.2d 978 (2002). Also Com. v. Washington, 592 Pa. 698, 739, 927 A.2d 586, 610 (2007). The Pennsylvania Court had repeatedly rejected similar arguments, holding that the mere existence of the McMahon tape does not demonstrate prejudice in a particular case. Commonwealth v. Williams, 581 Pa. 57, 863 A.2d 505, 523 (2004); Commonwealth v. Rollins, 558 Pa. 532, 738 A.2d 435, 443 n. 10 (1999); see Commonwealth v. Marshall, 570 Pa. 545, 810 A.2d 1211, 1228–29 (2002); Commonwealth v. Lark, 560 Pa. 487, 746 A.2d 585, 588–89 (2000); Com. v. Washington, 592 Pa. 698, 739-40, 927 A.2d 586, 610 (2007).

copy thereof shall be served upon the witness a reasonable time before such witness is required to attend court. For any disobedience to such subpoena the court may punish for contempt."). See also Rule 13 (a), SCRCrimP. The right to the production and presentation of witnesses and evidence – both constitutional and statutory - is not absolute. State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008). It is subject to rules of relevancy, materiality, and admissibility. See State v. Pope, 78 S.C. 264, 58 S.E. 815 (1907). In order to obtain court-ordered compulsory process, the defendant must be able to establish that the person against whom the compulsory process is sought - and, by analogy, the evidence that person is to be compelled to present - will be favorable to the defendant and material. Id. Also In the Matter of Hammer, 395 S.C. 385, 718 S.E.2d 442 (2011) (disciplinary case in which an attorney's act of subpoenaing a witness in a civil case who was not a witness to the underlying event without being able to explain how the witness' testimony was "pertinent" to the case formed one basis for finding a violation of the Rules of Professional Conduct); State v. Thompson, 278 S.C. 1, 11, 292 S.E.2d 581, 587 (1982) ( no error in quashing subpoena for evidence of the electric chair where it was not relevant to guilt, innocence or mitigation).

In his Brief, the Appellant contends that "the current Solicitor's Office has materials "that amount to a handbook on jury selection and help avoid a Batson challenge." Initial Brief of Appellant, p. 15. The wording is very important because there is no constitutional problem in "jury selection" or "avoiding a Batson challenge" any more so than a seminar by a defense lawyer on avoiding claims of ineffective assistance of counsel. As Judge Mullen concluded: "the materials do not include any abusive instructions or teaching materials, nor use of improper technique [and] [A]dditionally, the documents is generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's

preparations for trial." The trial judge actions did not impact on the trial in any manner. Relief is not warranted.

**V. The trial judge did not abuse her discretion in admitting State Exhibit 49, a photograph of the appellant on November 15, 2009 depicting the clothes he was wearing where the photograph was relevant to connect the particular clothing with a crime and the photograph was altered digitally to remove any potential prejudice of evidence that he was handcuffed at the time of the photograph. Any potential error must be deemed harmless when the defense introduced information evidence that Appellant was handcuffed when he was escorted from the Poppy Hill trailer in their opening statement and in their evidence.**

The State introduced at trial a photograph, State Exhibit 49, which depicted how Earnest Daise appeared and was dressed when the police came to the Poppy Hill trailer on November 15, 2009. Tr. 2128-2129. A general objection was made by the defense implicitly incorporating its earlier grounds from the pretrial hearing on October 7, 2013. Tr. 2128, lines 17-25. Importantly, the jury was told by the witness Asia Palmer that the photograph did not look like it had been changed or altered in any manner and was a fair and accurate representation of how the appellant was dressed when he left that day. Tr. 2128, lines 6-16. [A review of State Exhibit 49 reveals a color photograph of a sideways view of the Appellant standing in a room wearing a sleeveless white tank top shirt and belted blue jeans with his hands together in front of him and a pair of Nike blue and white shoes. No handcuffs are visible inasmuch as it was revealed outside of the jury's presence that the handcuffs were digitally removed from the photograph. State Exhibit 49.[29]]. Respondent submits the trial judge did not abuse her discretion in admitting the photograph which was relevant to establish the chain of custody of the items of clothing which ultimately included inculpatory evidence.

In his argument before this Court, the Appellant contends that the photographs of

[29] As revealed in other assertions to the trial judge at the motion hearing, the photograph was actually taken at a substation and not at Poppy Hill as the trial testimony before the jury would have suggested. See Pretrial Tr. P. 75, l. 7-76. .

defendant "while he was in custody" or in a "custodial pose" imply prior bad acts by the defendant and are inadmissible at trial. Although the Appellant has acknowledged that evidence of the handcuffs was removed from the photograph the jury saw, he still contends that because of the so-called "custodial pose" of Daise would have suggested to the jury that he had a prior criminal record. Initial Brief of Appellant, p. 17. Respondent submits that the assertions are without merit for a new trial. The potential prejudice of the handcuffs were digitally removed from the photograph, the identifying witness described the probative value that these were the clothes he was wearing and other non-objected evidence in the record was that the Appellant was handcuffs when he was escorted from Poppy Hill as a matter of procedure. Importantly, from the outset of Appellant's opening statement through its own questioning of witnesses, the defense – not the State – revealed that Daise was handcuffed after being taken into custody. None of the circumstances suggest evidence of a *prior* crime but merely concern in the instant case. A new trial is not warranted.

**STANDARD OF REVIEW**

Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Under Rule 403, SCRE, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted). If other witnesses testified regarding similar information an Appellant cannot prove he was prejudiced by the admission of this photograph. See State v. Griffin, 339 S.C. 74, 77–78, 528 S.E.2d 668, 670 (2000) ("There is

no reversible error in the admission of evidence that is cumulative to other evidence properly admitted."); State v. Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 662 (2013) (accord).

**HOW THE ISSUE WAS RAISED**

On January 7, 2012, the Appellant made a written motion for an order prohibiting the Appellant from being exhibited in jail clothing or visible shackles. Motion for AN Order Prohibiting Earnest S. Daise From Being Exhibited in Jail Clothing or Visible Shackles, Jan. 12, 2012. ROA __ . The written motion it was directed to how he would appear in court. The Appellant made a further motion concerning the suppression of photographic evidence. Motion 64. ROA _.

At the October 7, 2013 pretrial hearing, the Petitioner proceeded on his motion to suppress a photographs where Daise is handcuffed. Pretrial Tr. 74- 80. At the outset of the motion hearing, Solicitor Stone advised the court that the challenged photograph (State Exhibit 49) had been revised digitally to remove the visible presence of the handcuffs. Pretrial Tr.p. 74-75. Solicitor Stone stated that the challenged photograph was actually taken at the Beaufort County Sheriff's Office substation which was a house they used after hours and does not reveal the traditional law enforcement setting. He stated the purpose for the admission of the particular photograph was to show how Daise was dressed when he came out of the Poppy Hill Road address and to show the jeans he was wearing at that time which would aid in proving that they actually took them from him and got the inculpatory cutting from what he was wearing. Pretrial Tr.p. 75-76.

Defense counsel McGuire stated that they were willing to stipulate to the chain of custody. Pretrial Tr.p. 76, l. 3-11. He stated that the investigators had arrived at the Poppy Hill trailer for a knock and talk and that they spoke with Daise, patted him down, handcuffed him

and transported him to the substation. Pretrial Tr. 76-77. Counsel noted that they found 11 particles of gunshot residue. Id. Counsel McGuire revised his objection from the handcuffs to "the pose" of Appellant whether handcuffs could be seen or not. Pretrial Tr.p. 78.

Solicitor Stone responded that the Appellant's original objection was to the handcuffs which had now been removed. He stated the photograph's probative value was that it showed the jeans Daise wore that night. Although the offered stipulation to the chain of custody was appreciated, Solicitor Stone stated this issue was not about the "chain of custody," but the issue was what Daise was wearing that night when law enforcement arrived and this was the only photograph that they had of him in his jeans.[30] He noted that this was an issue of the State being able to try its case. He noted that only prejudicial matter was the handcuffs which have been removed. Pretrial 78, l. 5-20.

Counsel McGuire complained that it still looked like Daise was in a position of restraint and custody and those are never allowed. He equating it with photographs at bond hearings in jail clothes or civilian clothes and handcuffs. He claimed it was more prejudicial than probative and should be excluded under Rule 403.

Judge Mullen rejected the revised motion concerning the pose. She stated upon reviewing the photograph that they had removed evidence of the handcuffs and the jury could not tell he was in restraints. Further, the photograph does not depict Daise in a jumpsuit and a cinder block wall behind him or a line-up photo. Judge Mullen stated "I think he looks very unthreatening" in the photograph. Pretrial Tr.p. 79, l. 9-16. She opined that she did not find

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[30] The State is not required to accept a defendant's stipulation of proof because the State still bears the burden of proving every element of a crime beyond a reasonable doubt. See State v. Cheatham, 349 S.C. 101, 110, 561 S.E.2d 618, 623 (Ct. App. 2002).. Evidence was presented through retired SLED Analyst Ila Simmons that gunshot residue (GSR) was found on the Appellant's jeans. Tr.p. 2331-2333. She opined that the material was "consistent with that person (wearing the jeans) having fired a gun or being very close to a weapon when it was discharged. Tr.p. 2333. Blood found on the jeans retrieved from Appellant included an item that that matched the DNA profile of Jeanine Mullen, an item that matched the Appellant, and an item that Daise was a major contributor . Tr.p. 2364-2366.

anything prejudicial about it and nothing wrong with it where the Solicitor attempted to make it non-prejudicial. She opined that she can't tie the State's hands in trying the case and the state "needs to be able to show . . .that he came out in it." She opined that is why photographs are important and denied the revised motion. Pretrial Tr.p. 79-80.

During the trial, State Exhibit 49 was introduced over objection through Asia Palmer who lived at the Poppy Hill Road trailer with Jay Simmons and where Daise shared a room. She testified that he was there on November 15, 2009 and she saw Daise escorted out by law enforcement. She stated that the clothes he was wearing were accurately portrayed in the photograph and did not appear to be altered. Tr.p. 2127-2129.

Prior to that, Jay Simmons had testified that he stayed with Asia Palmer at the Poppy Hill address and that Daise had a key and stayed there sometimes. Tr.p. 2060. He stated on November 15, 2009, That evening he stated he did not realize Daise was there until the police got there. Tr.p. 2080.

**ANALYSIS**

Recently, this Court addressed the applicability of the cases the Appellant relies upon State v. Green, 412 S.C. 65, 770 S.E.2d 424 (S.C. Ct App. March 11, 2015) which concerned the introduction of a booking photograph. In Green, the Court of Appeals concluded that the trial court did not err in admitting the booking photo because the probative value of the booking photo was not substantially outweighed by the danger of unfair prejudice, and the State satisfied the three-factor test for the admissibility of a mug shot under State v. Denson, 269 S.C. 407 S.E.2d 761 (1977). See Rule 403; State v. Traylor, 360 S.C. 74 at 84, 600 S.E.2d 523 at 528 (2004) (stating "[t]he introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the [S]tate has a demonstrable need to introduce the photograph, (2) the photograph shown to the

jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication." (citing Denson, 269 S.C. 407, 237 S.E.2d 761)).

Contrary to the bare assertions of Appellant, the admission of State Exhibit 49 meets these standards for admission. First, the State had a demonstrable need to introduce the photo because it refutes any potential challenge to the clothes Daise was wearing at the time he was arrested. *See* State v. Stephens, 398 S.C. 314, 321, 728 S.E.2d 68, 72 (Ct.App.2012) (finding the probative value of a mug shot of the defendant increased when the defendant challenged the reliability of the victim's identification). The Appellant contends that there was no need to introduce the photograph because officers could and did testify that they removed the jeans from the Appellant and noted in the pretrial hearing that they were willing to stipulate to the chain of custody. Initial Brief of Appellant, p. 17. However, he implicitly recognizes that there is probative value to the photograph by his argument, which acknowledges a demonstrable need.

Next, the photo did not "suggest [Daise] has a criminal record." *Traylor,* 360 S.C. at 84, 600 S.E.2d at 528. The prosecution removed any evidence that he was wearing handcuffs at the time which, like Green removed any identifying marks that indicated the photo was taken as a result of an arrest. Daise, like Green, is wearing street clothes and is not holding a placard or other information indicating an arrest. See State v. Ford, 334 S.C. 444, 450 n.3, 513 S.E.2d 385, 388 n. 3 (Ct.App.1999) (finding "mug shots" that depicted "[o]nly the heads and necks of the individuals in the lineup" with "no identifying clothing or placards" did not suggest the defendant had a prior criminal record). See State v Robinson, 274 S.C. 198, at 200–01, 262 S.E.2d 729 at 730 (1980) (finding a photo of the defendant did not suggest he had a criminal record when there was nothing on the face of the photo that would indicate that the defendant

had a prior criminal record, and the jury could have inferred that the photograph was the result of the current investigation). Therefore, the photograph did not suggest Daise had a criminal record.

Further, the photo was not "introduced in such a way as to draw attention to its origin or implication." *Traylor,* 360 S.C. at 84, 600 S.E.2d at 528. The photograph depicted a scene in a room and was not identified as being taken at the police station. Rather, it was admitted through one of the Petitioner's companions, Asia Palmer, not a police agent, and suggested it was taken at the Poppy Hill trailer. Palmer had already testified that on November 15, 2009, law enforcement came to the trailer where she and Jay Simmons stayed and Daise had a room. Tr.p. 2125. Importantly, the court admitted the photo during her testimony that the photograph was a fair and accurate description of Daise on that date, thus, the manner the photo was introduced implied that it was related to the case, not a prior criminal record. Tr.p. 2126-2127. Thus, this factor weighs in favor of the admissibility of the photo.

Finally, Respondent submits that Daise suffered little prejudice, if any, from the admission of the photo because it did not suggest he had committed prior bad acts. See Traylor, 360 S.C. at 84 n. 12, 600 S.E.2d at 528 n. 12 (explaining the reason the admission of a mug shot is reversible error unless the State satisfies the Denson test is that "such photos are prejudicial because they imply a defendant's prior bad acts"). As previously stated, there was nothing on the face of the photo or the manner in which it was introduced that suggested Appellant had a prior criminal record. In addition, the photo was cumulative to other evidence admitted at trial because the trial court, including the testimony from Asia Palmer about Daise being escorted from the house that night.

Further, any concerns about the photograph's prejudice was removed when the defense,

on its own, presented evidence that Appellant was handcuffed in its cross-examination of witnesses. First, the Defense counsel, in his opening statement to the jury in the guilt phase stated that his client was in handcuffs when he was in custody.[31] Importantly, the defense (not the State) developed evidence that Daise was handcuffed on that day. Investigator Heirs testified they got Daise out of the house around 2:20 am. Tr.p. 2266. On cross-examination by the defense, the defense developed evidence that Daise was unarmed and that he let them cuff him. Tr.p. 2267-2268. On further defense questioning, Investigator Heirs stated he handcuffed him with the handcuffs he always carries. Tr.p. 2271-72. He stated they left the residence and Daise got into the squad car voluntarily without resistance "with handcuffs on." Tr.p. 2271 -2273. Therefore any potential error in the admission of the redacted photo was harmless beyond a reasonable doubt by the defense's affirmative admission of similar "handcuff"evidence that they had initially sought to exclude in the pre-trial motion. See State v. Griffin, 339 S.C. 74, 77–78, 528 S.E.2d 668, 670 (2000) ("There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.").

**VI. The trial court did not abuse its discretion in admitting relevant photographs from the crime scene to depict supportive evidence that there was no forced break-in nor the appearance of anything stolen at the crime scene in contrast to the defense assertion of a third party break-in although State Exhibits 5 and 6 also revealed boxes on a couch identified in camera as containing a birthday cake or cupcakes which would have been related to deceased child victim's birthday although never identified as such before the jury.**

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[31] During the opening statement, counsel McGuire stated:

> And you're going to hear that -- you're going to hear experts say that the gunshot residue on Earnest's pants, when they frisked him, -- because they went to his house. They went to his house, and they said, we want you to come with us; we want to interrogate you; we want to ask you some questions. He said okay. And they said, for your safety and officers' safety, we're going to pat you down and frisk you, like that. You guys have seen it on T.V. And for your safety, we're going to handcuff you. **Put handcuffs on him. Put handcuffs on him**. And then put him in a squad car, a marked police car with a cage, which is how they transport people.

Tr.p. 1707, l. 7-18. (emphasis added) . Also, Tr.p. 1708, l. 2. ("from the handcuffs").

## HOW THE ISSUE WAS RAISED AT TRIAL

During the pretrial proceeding, the defense made a motion to suppress photographs of the inside of the victim's home contending that they may be prejudicial and suggested the photographs were being solely introduced to arouse passion because in the background a box with a birthday cake within it was visible. During the pretrial proceedings, Solicitor Stone described three photographs, State Exhibit 5, 6, 7, and his intent to show that they reflected different portions of the home and no signs of forced entry to support that there was nothing stolen or broken. Pretrial Tr.p. 81, l. 5-16. Solicitor Stone described one photograph as showing the inside of the front door, the second showed the second section of the room including the television, stereo equipment as undisturbed and the third photograph shows the next section of the room. Pretrial Tr.p. 82. Solicitor Stone confirmed that nothing was stolen from the home. He noted that the photographs did not include the corner of the kitchen were the dead child was found, but was simply the front room.

Solicitor Stone stated that he understood that the objection was to the mere presence of a box that contained a number of cupcakes that the defense is describing as a birthday cake. Solicitor Stone confirmed that it was the deceased child's fourth birthday on the day of the incident. The State indicated that an additional concern raised by the defense was about any testimony that it was the one of the victim's fourth birthday. However, the Solicitor asserted that the fact of the birthday was part of the *res gestae* of the case because it was the basis for the entire situation which arose from problems getting transportation for the child victim's birthday party. He stated the family was trying to get the van back from Daise resulting in the victim's frustration because the party was supposed to be at an Applebee's with four children and the grandfather as a family dinner, albeit without Daise. Pretrial Tr.p. 85.

The defense contended that there was no need to mention a child's birthday at the trial (although he recognized that it was part of the aggravating factor for the death penalty). Pretrial Tr.p. 85-86. Counsel McGuire questioned the State's need to show how the birthday party played into Ms. Mullen's frustration because it had nothing to do with the Appellant's state of mind. Pretrial Tr.p. 86. While the defense urged that the State could put up evidence that there was discord in their relationship and that they were arguing, he contended the details should not be put in. Pretrial Tr.p. 86. He contended that the birthday cake was not relevant to malice aforethought by Daise. He contended this would only play on the emotions of the jury. Id.

Judge Mullen stated the State was entitled to tell the story to explain what occurred. She noted that the photographs did not show streamers or balloons typical of a birthday party. To the contrary, she noted it only showed a box with cupcakes in it and something underneath. She opined that the photographs were necessary to show that there was no forced entry and that the house was not ransacked or burglarized or that some other went in. Pretrial Tr.p. 87, l. 14-25. She declared that she did not find it to be prejudicial in any way and thinks it is probative and does explain that there was no forced entry. Pretrial Tr.p. 87.

Judge Mullen stated the actual photographs did not elicit any sympathy. She stated that she had a concern overly scrubbing a case so that the jury would not be able to tell what was going on and might think matters were hidden from them. She found that this evidence was within the state's theory of the case and that they were entitled to present it. Pretrial Tr.p. 88. Judge Mullen noted that the birthday cake was not displayed prominently and it did not say "Happy Birthday" on it and was merely a cakebox. Pretrial Tr.p. 89, l. 4-14.

**RELEVANT TRIAL EVIDENCE**

During the trial, the photographs were presented through Corporal Owen Lamb. Tr.p.

1718 – 1740. He described responding to Player Road , observed a white van in the driveway and went through the open door where he met another Deputy. "I observed that the living room was empty at the time. I observed the couch was to my left right when I walked in the front door. There was a birthday cake on top of the couch.." Tr.p. 1718. Counsel McGuire objected stating he renewed his prior objection. Tr.p. 1718, l. 7-8. Corporal Lamb then described entering the kitchen area and identified State Exhibit 4 as a fair and accurate depiction which was entered into evidence without objection. Tr.p. 1718-1719. Concerning State Exhibit 5, he described it as showing the front door of the residence looking from the inside and State Exhibit 6 as another picture of the front living room and that they were fair and accurate depictions. Tr.p. 1719-1720. He also referred to State Exhibit 7 as another view going into the kitchen. Tr.p. 1722-1723.

***The unique objection?***

At that point defense counsel McGuire stated "**I'm not objecting to the photographs. I just want to make sure I am protected on the record about this.**" Tr.p. 1720, l. 16-18. After an off the record bench conference, the trial judge then stated : "noted for the record objection preserved as to Exhibit Number 5. . . .Numbers 4, 5, 6, and 7 come into evidence, subject to previous objections." Tr.p. 1720, l. 22- p. 1721, l. 2. Tr.p. 1722-1723.[32]

***The undisturbed scene and lack of evidence of forced entry***

During Corporal Lamb's testimony he referred to State Exhibit 5 as he described going through the room and then coming upon the child. Tr.p. 1726-1727. No reference was made by

[32] Despite the clear double talk by defense counsel in front of the jury on whether he is objecting or not and the unknown basis of the actual objection, Respondent will assume arguendo that it is consistent with the presentation in the brief. However, this Court could find that the issue is not preserved by this ambiguity. To preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made. Failure to object when evidence is offered constitutes a waiver of the right to have the issue considered on appeal. State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) An objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005)(objection should be addressed to trial court in sufficiently specific manner that brings attention to exact error).

him to the existence of the birthday cake box in the particular photograph. Rather, he then described entering the kitchen and seeing the small child on the floor next to a table and the mother in the back bedroom. Tr.p. 1727 -1728.

Evidence of the photograph supported the State's showing that there was no forced entry into the trailer. Investigator Heirs testified, after describing the same challenged photographic exhibits (Tr.p. 1733-1734), that there were not any signs in that front room that anything had been broken, moved, or stolen. Tr.p. 1735, l. 1-6. Investigator Heirs then used challenged Exhibit 6 and 7 to describe the television with the stereo system on top and flowers implicitly reflecting that there were not disturbed. Tr.p. 1715. He further testified about his survey of the trailer with no signs of forced entry. Tr.p. 1737. He used additional exhibits to show that the door jamb and the front door appeared to be in good shape. Tr.p. 1738.

However, Inv. Heirs, like Cpl. Lamb testified about his ultimate discovery of the bloody children's clothing on the living room floor, the body of the child laying on his back inside the kitchen and the mother laying on her back appearing to have a gunshot wound on her forehead near the bedroom. Tr.p. 1739, l. 8-20. He noted that EMS had already been there at that time. Tr.p. 1739. He again confirmed that upon his review of the inside of the house, there was no forced entry and nothing appeared to be rummaged as if a burglary had occurred. Tr.p. 1740. Also, Tr.p. 1763 (SLED Lieutenant Jeff Crooks testified about additional photographs and how the door did not reveal any indication of any type of forced entry. Tr.p. 1763).[33]

Frank Mullin, the child victim's grandfather, described the fact that on that date of the incident he had spoken with his daughter about taking him to dinner for the child's birthday.

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[33] The next reference to the birthday was unrelated to the photographs. Dr. Robert Cina, on cross-examination by the defense without objection, testified about the health of the surviving child victim. Without objection, he stated in reference to one of his notes in his medical records concerning the mechanism of the victim's trauma that the intake report revealed "the story we were told was that he was at a birthday party, and his father came and shot his mother and older brother" but he acknowledged this was not firsthand information. Tr.p. 1976 - 1977.

Tr.p. 1980, l. 12-22. No objection was made. Similar unobjected testimony about the birthday was presented that Frank Mullin wanted to watch 60 Minutes on TV before he met up with them for the birthday. Tr.p. 1981, l. 5-23. Tragically, he described going over to his daughter's home that night after getting food with two of the children , seeing the daughter's van in the yard as shown in Exhibit 8 and wondering why it was like that (doors opened), (Tr.p. 1985-86), coming up to the door that was shut but not locked, calling his daughter's name, walking in and seeing the deceased child on the floor. Tr.p. 1987. After he told the other two children that were with him to stay there, he again called out his daughter's name and then found her lying on her face and the surviving child victim was at her feet. Tr.p. 1989-90. He described the panic of the other children as well as his fear in moving the victims. Tr.p. 1985-1993.

The 15 year old child testified that the evening before the Appellant stayed at the house. He stated that he saw the Appellant leave in his mother's white van that morning. Tr.p. 1998-2002, 2003. The child testified that he had an argument with his mother looking for his little brother's lost shoe. Tr.p. 2002. He then went out with his grandfather that day to find a little brother's shoe which they thought was in the white van. The child stated that when he returned with his grandfather that night he saw the van there, but "it looked like somebody had ransacked the van" – all the doors were open and it was unusual. Tr.p. 2003, l. 4-9. He identified State Exhibit 8 as showing what the van looked like when they arrived. Tr.p. 2003-04.

The 16 year old son of victim Jeanine Mullen testified that Daise was her mother's boyfriend at the time of the murder. Tr.p. 2005. However, that weekend that his mother told him that she didn't want to be with him anymore. Tr.p. 2005, l. 11-13. [No objection was made to this testimony]. He testified that he knew that his mother had a gun and kept it under the

pillow in her bedroom. Tr.p. 2005-06.[34]

During the questioning of SLED DNA analyst Paul Meeh, the defense inquired about touch DNA and asserted that if somebody had ransacked a van and went through the purse that it would be possible to test the contents. Tr.p. 2368. However, Agent Meeh stated that they do not have a tremendous amount of success with those things, but they have tried. Tr.p. 2368.[35]

The defense raised the aura about home invasions. Master Sergeant Purdy was questioned on defense cross-examination about his knowledge about a home invasion on December 3, 2009 in Dale, S.C. where there was an assault by two males demanding money in a residence beating a victim and stealing $200. Tr.p. 2244-45, 2247-48. He was also questioned about another home invasion that took place September 14, 2009 in Seabrook, S.C. where a suspect entered a home and bound two victims with duct tape and stole $300 and a cellphone. Tr.p. 2248-2249. However, on re-direct, the witness stated that there was no evidence of a break-in in this case. Tr.p. 2250. He confirmed that the only thing missing was the victim's .38 revolver. Tr.p. 2250.

During the State's closing argument, the State tried to rebut the defense's attempt to suggest that the van was ransacked as the defense implied in its questioning about the scene and the fact the van's doors were open. The Solicitor made an inference about the state of the van:

> For those of -- any of you or any of us out here that have ever had small children and a minivan, that's not a ransacked mini-van. That is a mother looking through the van for the shoe she's trying to find for the kid. This is the mother trying to get two small children that she's trying to get together on her own, ready for the birthday party. This is her purse. If the thieves were going through the van to ransack it, as suggested by the Defense, they probably would have stolen the purse. This is, as one of the witnesses referred to, soccer mom van, and that's what she was in the middle of.

Tr.p. 2461, l. 12-24.

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[34] The .38 caliber gun was missing from the scene. Tr.p. 2250, 2292. A .38 was recovered from Jamelle Simmons' room that was shared with Asia Palmer at Poppy Hill. Tr.p. 2166, 2179.

[35] In addition to the photographs of the van, evidence was presented that the victim's purse was on the front seat. Tr.p. 1747.

In the defense's closing argument in the guilt phase, the theory was that the State failed to use all of its tools of investigation in failing to adequately investigate the white van that the State claimed that Appellant had been driving. Tr.p. 2476, l. 7-22. He challenged the lack of fingerprints found in the trailer where the family lived, and the fact that there were other home invasions in the community. Tr.p. 2477-78. This was consistent with the defense's CSI effect opening statement to the jury which included:

> They should have printed the van. That was a critical missed opportunity. And Jeff Crooks will tell you about this thing called AFIS, A/F/I/S, Automatic Fingerprint Identification Service. You get the print; you put it in the computer; automatically it searches arrest records. And if there was a person in the neighborhood burglarizing houses, home invasions, shooting people, and they had a rap sheet, they'd have gotten their suspect immediately. And that was a road that they never, ever went down. Never went down.

Tr.p. 1702, l. 5-14.

**ANALYSIS**

"If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." Id. "When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008)."A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App.2003).

The trial judge did not abuse her discretion in admitting two photograph to show the state of the home after the killings merely because they included a cake box on a couch which was never identified to the jury as being either a birthday cake or cupcakes where there was other evidence admitted that it was the deceased victim's birthday. The focus of the two challenged

photographs was not upon the unidentified box on the couch, but on the fact that items of value in the room were not disturbed – the television, the stereo, the photographs, the clothes on the back of the couch, etc. It was evident that the home had not been ransacked in a quest for items. Rather it supported a theory that it was not a forced entry of a home invasion by a third party and supported the breadth of the police investigation as appropriate. This probative value was enhanced when the defense at the outset of the case injected the possibility of a third party home invasion through its opening statement and cross-examination and closing statement.

Further, assuming jury would have connected the box with a birthday of one of the victims, the prejudicial effect is significantly outweighed by the probative value of the complete photographs. The photographs were not about a birthday cake, but about the undisturbed area of the room. As Judge Mullen noted, the photograph did not suggest the crime happened in the midst of a birthday party with streamers. Rather, there was other evidence that it was the deceased child's birthday independent of any suggestion by the cake box on the couch.

Further, the fact that there was a birthday occasion was bound within the *res gestae* presented at the trial through the grandfather about the intended gathering at Applebee's that was never completed. Contrary to the pre-trial suggestion by the defense, the photographs were not introduced to unduly arouse sympathy and passions of the jury. It was for a proper purpose to deflect the CSI-effect suggestion that came concerning the quality of the investigation about an unknown random perpetrator. Appellant's assertion must be dismissed.

### VII. The Cumulative Error Concept Does Not Entitle Appellant to a New Trial

Appellant contends that he is entitled to a new trial based upon what he asserts are the cumulative errors present, citing State v. Freeman, 319 S.C. 110, 123, 459 S.E. 2d 867, 875 (Ct. App. 1995). Appellant then restates his six individual claims. Respondent submit that the facts of

this case do not support a finding of cumulative errors warranting reversal and incorporate by reference its arguments on the individual errors. An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). The errors must adversely affect his right to a fair trial to qualify for reversal on this ground. Id. In this regard, our courts have "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Id. (quoting State v. Mitchell, 330 S.C. 189, 199–200, 498 S.E.2d 642, 647–48 (1998)). First, because there were no errors in regard to the other issues, this issue is without merit. See State v. Kornahrens, 290 S.C. 281, 290, 350 S.E.2d 180, 186 (1986) (holding where the appellate court found no errors, appellant's assertion the trial judge should have granted a new trial because of the cumulative effect of the asserted trial errors had no merit); State v. Nicholson, 366 S.C. 568, 581, 623 S.E.2d 100, 106 (Ct.App.2005) (same). Further, even if the trial court did commit any errors, those errors are harmless such that Daise can show neither prejudice, nor that the errors affected his right to a fair trial. See Johnson, 334 S.C. at 93, 512 S.E.2d at 803 (finding the defendant failed to show he suffered prejudice warranting a new trial based on cumulative trial errors); State v. Wyatt, 317 S.C. 370, 373, 453 S.E.2d 890, 891 (1995) (error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. McEachern, 399 S.C. 125, 149-50, 731 S.E.2d 604, 616-17 (Ct. App. 2012) (same). Accordingly, Daise failed to demonstrate cumulative errors adversely affected his right to fair trial.

## CONCLUSION

For all the foregoing reasons, Respondent submits that the judgment and conviction and sentences of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 4, 2016

## CERTIFICATE OF SERVICE

**I, Donald J. Zelenka**, hereby certify that a true copy of the Amended Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon counsel for Appellant by depositing one copy of same in the United States Mail to:

Robert M. Dudek, Esq.
Chief Appellate Defender
SCCID/Division of Appellate Defense
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A. Mattison Bogan, Esquire
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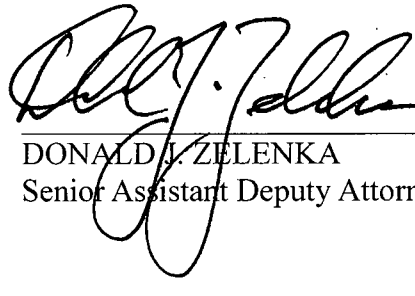
This 4th day of February, 2016.



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February 4, 2016

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
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Re: The State v. Earnest Stewart Daise
Appellate Case No. 2013-002394

Dear Ms. Kitchings:

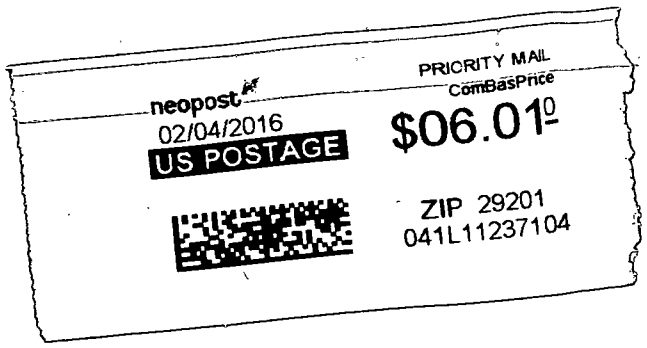
Enclosed please find the Amended Initial Brief of Respondent in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: A. Mattison Bogan, Esquire
Robert M. Dudek, Esquire
Isaac McDuffie Stone, Solicitor
Trisha Allen, Victims Assistance

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Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211