THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2009GS0702636, 2009GS0702637, 2009GS0702639,
2009GS0702594, 2009GS0702595
Appellate Case No. 2013-002394

The State, ... Respondent,

v.

Earnest Stewart Daise, ... Appellant.

FINAL REPLY BRIEF OF APPELLANT TO RESPONDENT'S AMENDED BRIEF

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In response to Appellant's twenty-one page initial brief, Respondent filed an seventy-three page initial brief. Appellant cannot respond to every contention contained in Respondent's brief. Appellant, herein, concisely direct the Court's attention to the issues of major importance in this appeal.

I. The issue of whether John Doe 2's comments were hearsay is preserved.

Respondent asserts that the issue of whether John Doe 2's statements to the EMT were inadmissible hearsay was not properly preserved because Appellant's objection centered on whether the testimony is admissible under *Crawford v. Washington*, 541 U.S. 36 (2004). Respondent's argument ignores the fact that "[i]t is the testimonial character of the statement that separates it from **other hearsay** that, **while subject to traditional limitations upon hearsay evidence**, is not subject to the Confrontation Clause." *State v. Brockmeyer*, 406 S.C. 324, 342, 751 S.E.2d 645, 654 (2013) (quoting *Davis v. Washington*, 547 U.S. 813, 821 (2006) (internal quotation marks omitted) (emphasis added).) Indeed, the Supreme Court in *Crawford* noted that the "primary object" of the Confrontation Clause is to bar "testimonial **hearsay**" from admission unless the person who made the statement was unavailable for trial and the defendant had prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36, 53 (2004) (emphasis added). Although the analysis of whether a statement is testimonial is different from whether a statement is admissible hearsay, a statement must first meet a hearsay exception before there is even a possibility of the statement being admissible under the confrontation clause. *See Crawford*, 541 U.S. at 68. Thus, necessarily, before a judge makes a *Crawford* ruling, the judge must first determine that the statement is admissible hearsay.

See Brockmeyer, at 342, 751 S.E.2d at 654. Accordingly, the issue of hearsay was raised and ruled upon by the trial court as a necessary component of the *Crawford* consideration. Appellant's *Crawford* objection, therefore, preserved the hearsay objection as well. *See State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding party need not use exact name of a legal doctrine in order to preserve the issue).

II. The EMT testimony was inadmissible hearsay.

The EMT testimony regarding John Doe 2's answers to questions were presented to prove the truth of the matter asserted—that Appellant harmed John Doe 2—and were, therefore, hearsay. Respondent asserts that the EMT testimony is admissible hearsay as an excited utterance, a present sense impression, and/ or medical diagnosis exception. None of the hearsay exceptions apply under the facts of this case and the trial court should have excluded this testimony. The failure to do so prejudiced Appellant and necessitates a new trial.

a. The excited utterance exception is inapplicable.

An excited utterance is 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. "A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception." *State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). The burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence. *Id.* 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. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). The fact that a statement concerns a violent crime, even murder, is inadequate to establish an excited utterance. *Davis*, 371 S.C. at 179, 638 S.E.2d at 62.

Here, Respondent cannot meet its burden to prove the elements of the exception. There is no testimony concerning John Doe 2 being under the excitement of the events causing his injury. This is because John Doe 2 was not under the stress of excitement. Rather, John Doe 2 was groggy, non-responsive, and uttering complete nonsense. (Tr. p. 1805:1-20, 1809:4-1810:14, 1822:16-22; R. 1890, 1894-1895, 1907.) When the EMTs first arrived, John Doe 2 was unconscious. (Tr. p. 1803:15-17, 1809:4-7, 1818:16-22; 1822:16-22, R. 1888, 1894, 1903, 1907.) He only responded to painful stimuli. (Tr. p. 1818:14-22, 1822:23-1823:1; R. 1903, 1907-1908.) When asked his name, John Doe 2 responded with a name that was not his. (Tr. p. 1805:16-20, 1820:8-12, 1821:4-9, R. 1890, 1905, 1906.) The EMTs considered John Doe 2 to be in an "altered mental state":

Q: And your report indicates that he was in an altered mental state.

A: Yes. We consider when you're not normally, typically, verbally responsive, we consider that altered mental status.

Q: Right. And that was the status he was in.

A: Yes.

(Tr. p. 1810:8-14, R. 1895.) After mumbling nonsense answers to a few questions, John Doe 2 was unable to answer any more questions. (Tr. p. 1811:3-25; R. 1896.) Moreover, John Doe 2's statements were not spontaneous. Rather, they were made in response to questioning by the EMT.

As there is no evidence demonstrating John Doe 2 made the statements to the EMTs while under excitement, Respondent cannot meet its burden to prove the second element of the exception. Nor can Respondent meet the third element. Since Respondent cannot even demonstrate John Doe 2 was in an excited state, it stands to reason that there is no proof that the stress of excitement was caused by the startling event. Additionally, the fact that the statements may have concerned a violent crime is insufficient to prove the elements of the excited utterance exception. Therefore, John Doe 2's statements were not admissible under the excited utterance exception to the hearsay rule and the trial court should have excluded the EMT testimony.

b. The present sense impression exception to the hearsay rule does not apply.

Similarly, the present sense impression exception to hearsay is inapplicable. "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). Where there is no indication of the amount of time between the event occurring and the when the statement is made, then the statement is not admissible under the present sense impression exception. *See State v. Garcia*, 334 S.C. 71, 77, 512 S.E.2d 507, 510 (1999) (Holding present sense impression exception inapplicable where "[t]here was no indication as when appellant had kicked or threatened the deceased so as to determine the timing of the events in relation to her statements to Hopper and Estes.").

Here, there is no direct evidence in the record that demonstrates the amount of time between John Doe 2 sustaining his injuries and when John Doe 2 made his statement to the EMTs. Moreover, when the evidence in the record is analyzed logically, the only inference is that a substantial period of time passed between the events that occurred at the home and John Doe 2's statement to the EMTs. There was testimony that a friend in the area picked up Appellant a little after 6 PM. (Tr. p. 2072:15-17, 2074:24-2075:18; R. 2157, 2159-2160.) Therefore, even assuming Appellant committed the crime,[1] the incident must have occurred before 6 PM. John Doe 2 was not discovered until somewhere between 6:30 and 7 PM. (Tr. p. 1984:17-20; R. 2069.) Once John Doe 2 was discovered, the police were not immediately called. Rather, the family members who discovered the scene had to be calmed and taken to a neighbor's house. (Tr. p. 1988:8-25; R. 2073.) Only then were the police called. (Tr. p. 1988:8-25; R. 2073.) Two separate police officers arrived before the first EMT. (Tr. p. 1717:17-1718:2; R. 1805-1806.) John Doe 2 was not immediately taken to the hospital. (Tr. p. 1795:2-1798:15; R. 1880-1883.) The first EMT "waited until the scene was secure" before entering the residence and treating John Doe 2. (Tr. p. 1795:6-7; R. 1880.) After all this occurred, the another set of EMTs arrived and transported John Doe 2 to the hospital. (Tr. p. 1797:19-1798:10; R. 1882-1883.) During this drive, John Doe 2 made the statements at issue. (Tr. p. 1809:15-16, 1810:15-24; R. 1894, 1895.) Thus, even the limited information concerning the timeline of events demonstrates John Doe 2's answers to the EMTs' questions were not made contemporaneous with the events John Doe 2 witnessed. Rather, a substantial amount of time transpired between the statements and the events

[1] Appellant does not concede that he is guilty of any crime accused.

described. Accordingly, Respondent has not met its burden to demonstrate that the statement is admissible under the present sense impression exception. *See State v. Burroughs*, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997) (holding present sense impression exception inapplicable when a substantial amount of time transpired between events and statement).

c. The medical treatment exception is inapplicable.

The hearsay exception for medical treatment can only apply to a victim's statements if the statement is "reasonably pertinent" to medical treatment or diagnosis. Rule 803(4), SCRE; *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997) (finding that the fact that the defendant asked the victim if he could hug her before committing the crime was in no way reasonably pertinent to the victim's diagnosis or treatment). The "perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." *State v. Brown*, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985); *State v. Camele*, 293 S.C. 302, 305, 360 S.E.2d 307, 308 (1987) (granting new trial where doctor's testimony concerning statement made by victim during medical examination as to the perpetrator's identity could not possibly have assisted the doctor in treating or diagnosing the victim); *accord State v. Hudnall*, 293 S.C. 97, 101, 359 S.E.2d 59, 62 (1987).

John Doe 2's responses to the EMTs' questions were not necessary for medical treatment or diagnosis. In fact, the EMTs admitted that the identity of the person who harmed John Doe 2 was not necessary for medical treatment:

Q: Okay. And the identity of who may have shot him doesn't change his medical wounds; does it?

A: Not that I'm aware of.

Q: Right. That would have nothing to do with the extent of his injuries or his treatment and care?

A: No

* * *

Q: -- the type of bandage you would apply to [John Doe 2] to stop bleeding, that decision's not going to change based on who he says hurt him.

A: Based on what? I'm sorry?

Q: Based on who he says hurt him.

A: No.

Q: And based on who he said hurt him wouldn't change the fluids you gave him.

A: No.

Q: Or any of the medical decisions you made in that ambulance.

A: No.

(9/26/13 Pre-Tr. p. 23:25-24:5, 25:1-12; R. 30-31, 32.) The EMTs initially testified that the medical purpose of questioning John Doe 2 "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." (9/26/13 Pre-Tr. p. 25:16-19; R. 32.) The EMTs later further testified that in addition to testing John Doe 2's cognitive abilities, the purpose of the questioning was also to ensure the wound was not self-inflicted, and determine if John Doe 2 knew what happened. (9/26/13 Pre-Tr. p. 29:20-30-9; R. 36-37.) However, it was unnecessary to discover the identity of the perpetrator in order to treat or diagnose John Doe 2. There is no rational explanation as to how a question the EMTs did not know the answer to, could be used to determine John Doe 2's cognitive thought process. The EMTs had no idea if John Doe 2's response was correct or not. Similarly,

the EMTs could not determine if John Doe 2 knew what happened as the EMTs themselves did not know what happened. Surely, the EMTs did not expect a two-year old, in an altered mental state, to be able to accurately describe the events that lead to his injury.[2] It is equally puzzling how the question "who hurt you," which implies that the questioner expects you to give the name of another individual, could elicit the information regarding self-inflicted injuries. Clearly, the only purpose of asking these questions—coincidentally, also the purpose of the EMTs' testimony—was to prove who committed the crimes. The question, and John Doe 2's response, was not necessary for treatment or diagnosis. Because this testimony was offered to prove who committed the crimes, and does not fit into a hearsay exception, the trial court should have excluded the testimony. The failure to exclude this testimony prejudiced Appellant, entitling him to a new trial.

III. The EMT testimony violated Appellant's confrontation clause rights.

John Doe 2's statements were testimonial. Respondent relies on *Ohio v. Clark*, 135 S. Ct. 2173 (2015), for the argument that the testimony does not violate the confrontation clause. However, *Clark* is distinguishable. In *Clark* the statements of a three-year old boy to his teachers regarding who abused him at home were deemed non-testimonial.[3] The Supreme Court found the statements to be non-testimonial as the

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[2] The fact that young children often cannot recall events accurately is why children are not competent to testify at trial. *See S. Carolina Dep't of Soc. Servs. v. Doe*, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987) (stating that in order to be competent to testify a child under fourteen years of age must be able, among other requirements, "to perceive facts accurately through the medium of the senses, [and] to recall them correctly")

[3] The three-year old's statements in *Clark* were hearsay, but were admissible due to an Ohio statute for which South Carolina has no corresponding statute. *Clark* at 2178; *see*

"statements occurred in the context of an ongoing emergency involving suspected child abuse." *Id.* at 2181. The emergency in *Clark* was that the child's teachers needed to know if it was safe to release the child to his guardian at the end of the day. *Id.* In order to meet this emergency, the teachers needed to determine who might be abusing the child. *Id.* Thus, the emergency was ongoing. *Id.*

In further support of the holding that the child's statements were not testimonial, the court noted the age of the child and that "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." *Id.* at 2181-82. Finally, the court also noted a student-teacher relationship is very different from that between a citizen and the police. *Id.* at 2182. Thus, the statements were not barred by the confrontation clause.

The statement elicited by the EMTs from John Doe 2 is distinguishable. First, the question "who hurt [you]" was not made in order to respond to an ongoing emergency. (Tr. p. 1806:13-25; R. 1891.) The EMTs testified the questions were not made in order to determine if the perpetrator was still lurking near-by or ensure the immediate safety of

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also Ohio Evid. R. 807 (allowing statements from children under twelve-years of age to come into evidence regardless of whether the statements meet another hearsay exception, South Carolina's Rules of Evidence contains no corresponding rule). Otherwise, the three-year old "was not competent to testify." *Clark*, at 2178. Similarly, John Doe 2 was not competent to testify. *See S. Carolina Dep't of Soc. Servs. v. Doe*, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987) (stating that in order to be competent to testify a child under fourteen years of age must be able, among other requirements, "to perceive facts accurately through the medium of the senses, [and] to recall them correctly"); *see also State v. Belton*, 24 S.C. 185, 190 (1886) (holding that a twelve-year-old boy was not a competent witness). Thus, John Doe 2's hearsay statements should not receive greater protection due to the fact that he is not testifying than they would if he actually testified in court.

anyone. (9/26/13 Pre-Tr. p. 27:16-28:8, R. 34-35.)[4] Rather, the EMTs claimed the purpose of the question was to judge the cognitive ability John Doe 2, to ensure the wound was not self-inflicted, and determine if John Doe 2 knew what happened. (9/26/13 Pre-Tr. p. 25:16-19, 29:20-30:9; R. 32,36-37.) As previously explained, there is no logical explanation for how the answer to the question "who hurt you" could be utilized to gather the information the EMTs claim the question sought. Further, the EMTs admitted the name of the perpetrator is not necessary to medical treatment. (9/26/13 Pre-Tr. p. 23:25-24:5, 25:1-12; R. 30-31, 32.) South Carolina case law recognizes that the identity of a perpetrator is not necessary for medical treatment. *See Brown*, 286 S.C. at 447, 334 S.E.2d at 817; *Camele*, 293 S.C. at 305, 360 S.E.2d at 308; *Hudnall*, 293 S.C. at 101, 359 S.E.2d at 62. The only plausible explanation for the questioning regarding the identity of the perpetrator is so that it could be used at trial. Thus, the statements are testimonial and barred by the confrontation clause.

Although John Doe 2 was only two-years old when he made the statements to the EMTs, this does not change that the reason the EMTs sought the information was to assist the police—making the EMTs agents of the police. Statements made to agents of the police are testimonial and inadmissible under the Confrontation Clause. *See, e.g. Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006).

Finally, the interaction between citizens and EMTs is much more akin to the interaction between citizens and police officers than between a student and a teacher. *See Clark*, at 2183. Indeed, the EMTs became the agents of the police with they conducted the functional equivalent of an interrogation during the ambulance ride. Thus, the

[4] The police had already secured the area. (Tr. p. 1717:17-1718:2, 1795:6-7; R. 1805-06, 1880.) Thus, this information was not necessary for anyone's safety.

interaction between John Doe 2 and the EMTs is more analogous to the interaction between citizens and the police than a student with a teacher. Accordingly, *Clark* is not controlling, rather, to some extent it proves the EMTs' role establishes the confrontation clause violation.

Accordingly, John Doe 2's statements are testimonial and should have been excluded under the Confrontation Clause. The failure of the trial court to exclude the statements prejudiced Appellant, entitling Appellant to a new trial.

IV. A witness for the State impermissibly commented on the credibility of another witness.

Respondent argues that SSG Jeremiah Fraser's testimony regarding the truthfulness of another witness, Jay Simmons, was offered to explain the course of the investigation, and was, therefore, permissible. This argument ignores that the Solicitor, in response to an objection over SSG Frasier's testimony, specifically stated "the whole purpose of him [SSG Fraser] testifying is to comment on the credibility [of Mr. Simmons]." (Tr. p. 2108:17-18; R. 2193.)

The credibility of a witness is an assessment within the exclusive province of the jury. *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499-500 (2013). Therefore, witnesses are not allowed to testify whether another witness is telling the truth. *Id*; *see also Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding it is improper "pitting" to ask a witness "to comment on the truthfulness . . . of an adverse witness"); *State v. Sapps*, 295 S.C. 484, 485-86, 369 S.E.2d 145, 145-46 (1988) (holding it was improper for the State to "ask[] appellant if each of the other three witnesses was lying"). These principles are incorporated into Rule 608(a) of the South Carolina Rules of Evidence, which provides that opinion evidence regarding credibility "may refer only to

character for truthfulness or untruthfulness," and "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Rule 608(a), SCRE.

Thus, the trial court should not have allowed SSG Fraser to comment on the credibility of another witness. Mr. Simmons ultimately gave conflicting testimony regarding Appellant's whereabouts and demeanor on the day the crimes were committed, which was consistent with conflicting information Mr. Simmons gave law enforcement during their investigation. (Tr. p. 2065, 2072-2081, 2086-2091, 2097-2105; R. 2150, 2157-2166, 2171-2176, 2182-2190.) The reason behind the conflicting stories from Mr. Simmons was plausibly explained by threats from law enforcement officers concerning possible charges against Mr. Simmons for accessory after the fact. (Tr. p. 2103:6-20; R. 2188.) The jury, therefore, could reasonably believe that Mr. Simmons began to tell the police what the police wanted to hear in order to ensure Mr. Simmons was not charged with a crime. To combat that reasonable belief, the State had SSG Fraser comment that he did not find the portion of Mr. Simmons' story that helped Appellant credible. (Tr. p. 2108: 5, 11, 24; R. 2193.) The jury alone is allowed to decide whether to believe Mr. Simmons' testimony in full or in part.

The State called Mr. Simmons. (Tr. p. 2058:10-15; R. 2143.) (Tr. p. 2105:17-21; R. 2190.) Thus, the State obviously believed Mr. Simmons had relevant and credible testimony the jurors should hear. Yet the State sought to take the determination of how much credibility to give Mr. Simmons away from the jury through SSG Fraser's testimony. Taking that determination away from the jury prejudiced Appellant.

Respondent's argument that Appellant was not prejudiced by SSG Fraser's commentary because "everyone in the courtroom questioned the credibility of Simmons's trial testimony," is illogical and unpersuasive.[5] The entire purpose of not allowing one witness to comment on the credibility of another witness is to allow the jury, and only the jury, to determine whether to believe a witness or not. It was improper for the trial judge to allow the State to have a witness tell the jury not to believe a particular portion of a witness's testimony, but to believe another portion of the testimony beneficial to the State. Particularly when Appellant offered a logical explanation for the conflicting testimony that a reasonable juror could believe. Hence, allowing SSG Fraser to comment on the testimony of another witness prejudiced Appellant and Appellant is entitled to a new trial.

V. Testimony that one of the victims was afraid of Appellant was not relevant evidence, regardless of whether the testimony falls within a hearsay exception.

Respondent devotes almost four full pages of its brief to the argument that the testimony that one of the victims was "terribly afraid" of Appellant satisfies a hearsay exception. However, this misses the entire point of Appellant's argument regarding the testimony. It does not matter if the testimony satisfies a hearsay exception because the testimony was not relevant and its prejudicial effect substantially outweighed its probative value. *See State v. Garcia* 334 S.C. 71, 76-77, 512 S.E.2d 507, 509-10 (1999) (victims fear of defendant only relevant when defendant contends the death was the result of accident or to assist the jury in determining the aggressor); *State v. Bush*, 211

[5] The argument is even more perplexing since the State offered Mr. Simmons as a witness. If Mr. Simmons is someone whose testimony cannot be trusted then the State should not have offered him as a witness. *See* Rule 3.3, RPC, Rule 407, SCACR ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.").

S.C. 455, 460, 45 S.E.2d 847, 849 (1948) (finding that, because the defendant alleged self-defense, testimony concerning the demeanor of the parties at the time of crime was relevant to help the jury determine who was the aggressor); *accord State v. Adams*, 68 S.C. 421, 47 S.E. 676, 677 (1904); Rule 403, SCRE. Here, Appellant did not offer a theory to how the murders occurred—other than to assert his innocence—thus, testimony regarding a victim's fear of Appellant was not relevant. Evidence that is not relevant has little to no probative value. Therefore, the prejudicial effect of the testimony substantially outweighs the probative value. Accordingly, the trial court erred in admitting the testimony. Further, this testimony prejudiced Appellant because it allowed the jury to believe that a victim's fear of Appellant means Appellant was guilty of the crimes accused. Appellant, therefore, is entitled to a new trial.

VI. The trial court should have ordered the Solicitor's office to produce materials amounting to a *Batson* handbook.

a. The Solicitor's office *Batson* materials can be used to prove a *Batson* violation.

Respondent argues that training materials or a *Batson* handbook cannot be utilized to help make a successful *Batson* challenge. As an initial matter, this ignores that the United States Supreme Court has specifically held that reliance on training materials or a handbook that causes unconstitutionally disparate questioning does help prove a *Batson* violation. *See Miller-El v. Dtretke*, 545 U.S. 231 (2005).

Moreover, the cases Respondent relies on are easily distinguishable. In *Howard v. Horn*, 56 F. Supp. 3d 709, 723-24 (E.D. Pa. 2014) the court held that a video made by an assistant district attorney encouraging the picking of non-African-American jurors could not be used to demonstrate a *Batson* violation without linking the video to the

specific prosecutor making juror challenges. However, in this instance, Appellant never had the training materials to link to the specific challenges made by the Solicitor. Accordingly, depriving Appellant of the requested materials prevented Appellant from making a viable *Batson* challenge. Respondent cites to numerous Pennsylvania decisions concerning the same video tape in support of Respondent's argument. Not only is this case law not controlling authority, but is also distinguishable.

After *in camera* review, the trial court ruled "the materials do not include any abusive instructions or teaching materials, nor use of improper technique." However, while the requested materials may appear innocuous when viewed in a vacuum, they can help a defendant prove purposeful discrimination when applied to the challenges made by the State. *See Miller-El*, 545 U.S. at 266. Thus, the trial court's ruling deprived Appellant of necessary evidence to make a viable *Batson* challenge. The trial court, therefore, should have ordered the Solicitor to turn the *Batson* handbook over to Appellant.

b. The work-product doctrine does not protect the Solicitor's materials.

The work-product doctrine is inapplicable because Appellant has a substantial need for the *Batson* handbook and could not acquire the handbook by other means. "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).

Here, there was a substantial need for the requested information as it was necessary for Appellant to make a viable *Batson* motion. The solicitor admitted the requested materials exist and the solicitors office uses and follows the guidance contained

therein. (10/07/13 Pre-Tr. p. 17:23-18:4; R. 66-67.) Appellant was prevented from having the materials to determine if they negatively infected how the Solicitor selected the jury and whether the jury selection was tinged with impermissible bias. Thus, Appellant was unable to make a viable *Batson* motion. Accordingly, Appellant had a substantial need for the materials in order to ensure Appellant's "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria[,]" *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986), was not violated by an improper jury selection process.

CONCLUSION

For the reasons set forth above and contained in Appellant's initial brief, Appellant requests this Court reverse the decision of the trial court and remand for a new trial.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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Appellate Case No. 2013-002394

The State, ... Respondent,

v.

Earnest Stewart Daise, ... Appellant.

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Final Reply Brief of Appellant

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March 17, 2016

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March 17, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: The State v. Earnest Stewart Daise
Appellate Case No. 2013-002394
Our File No. 38769/01523

Dear Ms. Kitchings:

Enclosed please find the original and fifteen (15) copies each of Appellant's Final Brief, Final Reply Brief, and the Record on Appeal Volumes 1-VI. We would ask that you file the original and return clocked-in copies of each to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of the Final Briefs.

Very truly yours,

Phillips L. McWilliams

PLM: mws
Enclosures
cc: Alan M. Wilson, Esquire
Donald J. Zelenka, Esquire
Robert M. Dudek, Esquire