

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

CA No. 2012-GS-32-2619
Appeal Case No. 2014-001500

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SC Court of Appeals

The State.....Respondent,
v.
Robert Jared Prather.....Appellant.

APPELLANT'S FINAL BRIEF

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STATEMENT OF FACTS

Robert Jarad Prather was tried and convicted of the murder of Gerald Stewart, a man in his "mid to late 40's", who, as a chronic alcoholic, had a severely enlarged heart, liver, and spleen. At the time of his death, he weighed 285 pounds. At trial, the State's forensic pathologist, Janice Ross, testified that he could have died at any moment due to his poor health:

Q: But, of course, on the other hand, with that enlarged heart he had, he could have died at any time; is that correct?

A: Yes.

Q: Just drop dead?

A: Yes.

R.p.366, lines 12-17.

Prather was initially tried on October 26-28, 2009 but the jury did not convict him. Three years later, the State tried him again and, "fixing" the numerous shortcomings of its case, offered the new testimony of Officer Mark Jones who testified that Prather must have carved "rapist" into the decedent's back because his co-defendant, Joshua Phillips misspelled "rapist" in his written statement to him.¹ Over strenuous objection, the trial court judge admitted the testimony. See Argument IV. The State also called SLED "profiler" Paul LaRosa, in rebuttal, and without any notice to the defense at all, who analyzed the crime scene and concluded that "two people" were responsible for the condition of the decedent's body that, in addition to being

¹ "Rapist" was carved into the decedent. "Rapeist" was contained twice in Phillips' statement.

carved, was also covered with a blanket. See Arguments I, II, and III. Joshua Phillips, Prather's co-defendant who has a long history of mental illness, did not testify at either trial.

One week after Prather was found guilty and sentenced, the State allowed Joshua Phillips to plead guilty to voluntary manslaughter for a negotiated 20 year sentence. At that plea, which was handled before another judge by the same solicitors who handled Prather's case, the State offered a factually inconsistent version of events and informed that trial court judge that Phillips had given "his most truthful statement so far" and admitted to carving R-A-P-I-S-T into the decedent's back, thus contradicting the State's argument in Prather's trial presented through the testimony of Officer Mark Jones. Phillips also admitted smothering the victim and then covering him with a blanket. See Argument VI. Not only were these statements contrary to the State's position taken at trial, but they were contrary to the position taken by LaRosa, the State's 11th hour, previously undisclosed, star rebuttal expert witness.

Gerald Stewart was well known to law enforcement because he worked as a confidential informant. He had drug arrests for distribution of cocaine that were dismissed in connection with his financial agreement to help put others behind bars. R.pp.508-510. He also cooked barbeque, and law enforcement personally liked him. He also had a close relationship with a particular magistrate judge.²

² See In the Matter of Richland County Magistrate Clemon L. Stocker <http://www.judicial.state.sc.us/opinions/displayOpinion.cfm?caseNo=25938> (last visited July 28, 2015).

In the early morning hours of Stewart's death, police came to his house to investigate, and they found someone in a back bed room, hidden under the covers— Stewart's roommate, Ron Rabon-- who was planning on moving out that Friday because he found out Stewart was a homosexual when he walked in on him and another gentleman watching a porno movie together. Despite his presence at the house when Stewart died, law enforcement never investigated him as a suspect.

THE EVENTS OF APRIL 21- 22, 2005

Prather testified on his own behalf at both of his trials and his version of events remained consistent. He testified that he met Gerald Stewart at a bar called "Calloway's" and was introduced to him by Joshua Phillips. R.p.652, lines 3-4. The night he met him, Prather told Stewart that he had received a fine in Richland County. Stewart said that he knew a judge who could reduce that fine. R.p.652, lines 3-23. A week later, Prather was again playing pool at Calloway's and Stewart showed up. He said he was looking for Joshua to give him a note about Prather meeting with the judge. It had Stewart's phone number on it. This note was found in Prather's wallet. *Id.* Prather said he called Stewart a couple of weeks later, and they agreed to go meet the judge one Saturday morning. R.p.653, lines 3-7. Prather picked him up at his house, and they met with the judge. *Id.*

On April 21st, the night before Stewart's death, Prather was again playing pool at Calloway's. Joshua showed up with his new girlfriend. She eventually left, and Prather's friends left. Joshua and Prather stayed and continued playing pool. R.pp.653-

64. Joshua asked if Prather could give him a ride to his brother's house, and he did so. They hung out with Joshua's brother that night. R.p.654, lines 1-14.

The next morning, they did not have anything to do. Joshua suggested that they go to Gerald Stewart's house. R.p.654, lines 16-25. Prather drove. R.p.655, line 20. They arrived around 1:00 pm. R.p.655, line 6. The three of them hung out and drank. Phillips and Stewart were drinking whiskey. R.p.655, lines 10-12. When they ran out, Prather drove all of them to the store to get more. R.p.655, lines 17-20. Around 5:00-6:00 pm, Ron Rabon, Stewart's roommate, arrived. R.p.656, lines 1-15. He changed out of his work clothes and then joined them. Around 8:00 pm, they left to buy more whiskey. *Id.* They ended up buying beer instead. R.p.657, lines 4-5. They returned to the house and went back to playing cards. *Id.* Stewart told them that, if they were looking to make some money, that he had a building in the backyard that needed to be cleaned out. They got up to walk outside to look at it. Prather went to the refrigerator to get a beer; Joshua and Stewart were outside. R.p.657, lines 17-20. As Prather walked outside, he saw Joshua and Stewart on the ground, rolling around. Joshua was screaming at Stewart and hitting him in his face, chest, and stomach. *Id.* Prather broke up the fight and helped Stewart get up, R.pp.658-657, and make his way back into the house. When they got back into the house, Joshua hit Stewart in the mouth again. *Id.*

Prather attempted to speak to Joshua about what was going on, but Joshua was crying and upset. He would not tell Prather what the fight was about. R.p.659, lines 5-10. At this point, it was around 10:00 pm. Around that time, Ron Rabon came out of his back bedroom and asked them if they knew where he could buy some cocaine. Joshua

told him that a guy sells it behind his brother's house. Then, Joshua, Prather, and Rabon went to the brother's house and purchased \$20 worth of cocaine from a man who lived behind Joshua's brother's house. Prather testified that he and Rabon consumed the cocaine. R.pp.659-660. While there, Joshua and his brother had a fight and Joshua's brother gave him a box with his belongings in it and told him to leave. Joshua threw the box in Prather's car and they went back to Stewart's house. R.p.660, lines 12-18.

They returned to Stewart's house around 11:15 pm. Rabon went back to his bedroom. Stewart put on the movie, "Tombstone." R.p.660, line 25. Joshua was falling asleep, so Prather handed him a pillow. Prather and Stewart finished watching the movie. Stewart indicated he wanted to go out and do something. R.p.661, lines 10-17. Prather said he wanted to take Joshua's stuff back to his brother's house, so he left and did that. He was gone for about 45 minutes to an hour. He returned to Stewart's house and honked the horn. R.p.661, line 25. Stewart eventually came out, and they drove off. R.p.662, lines 2-4. They ended up at Uncle Louie's, a bar. They drank beer. Then Stewart ordered shots of vodka. Prather did not drink any of the vodka. R.p.663, lines 1-4. Prather went to the bathroom, and when he returned, Stewart was gone. The bartender told him that Stewart went across the street to use the ATM machine. Stewart did not return. The bar was closing and the bartender told him there was a tab. Prather said something like, "someone should kick his ass for that!" R.p.663, lines 23-24. Prather said the bartender told him not worry about it; that he does it all the time. R.p.664, lines 4-6.

On the way back to his house, Stewart wanted to know if Prather could get him any cocaine from the guy they got it from earlier. Prather told him he really did not know him that well, but that he would try. He dropped Stewart off at his house, and then went back to the drug dealer. He was gone for about thirty minutes. R.p.664, line 30. He did not get any additional drugs.

Prather then returned to Stewart's house and walked in. He saw Stewart come out of his bedroom completely naked, and with an erection and clothes in his hands. R.p.665, lines 4-6. Stewart looked at him, and asked if he knew that Josh "liked his dick sucked." And he asked him if he (Prather) had ever "fucked Josh." R.p.665, lines 11-13. As he was saying this, Stewart began dressing. Prather asked where Josh was, and Stewart told him not to worry about it. Prather wanted to take Joshua home, but Stewart told him he was not leaving. R.p.665, lines 18-19. Prather started to move, and Stewart grabbed his arm. Prather told him that if he did not let him go, he would call the police. Stewart told him that he was not going to do that. Prather then hit Stewart, R.p.666, line 9, and they fell to the floor. Prather jumped up and went into the bedroom. There he found Joshua in bed in his boxers. Prather screamed at him to get up, but Joshua did not move. He tried to shake him to wake him up, but he was not moving. He slapped him in the face and saw his eyes roll back in his head. R.p.667, line 21. When Joshua came to, they saw a dildo on the bed by Joshua's feet. They looked around for Joshua's clothes and then left the bedroom and entered the living room area. They observed that Stewart was getting up, and using the couch to help

him. Joshua hit Stewart again on the head. R.p.668, lines 19-20. Joshua was screaming and upset and kicked Stewart. R.p.66, line 23- p. 669, line 4.

At the time of this incident, Prather weighed 135 pounds. R.p.669, line 20.

As they were leaving, Joshua could not find his shoes. At the door, Prather went out to the car and Joshua went back into the house to find his shoes. R.p. 670, lines 6-8. When he left the house, Stewart was still alive. Prather denies that he carved anything into Stewart's back. R.p.670, lines 23-25.

Joshua walked quickly back to the car. He had something in his hands, but it was dark so Prather did not identify it. Prather told Joshua that they needed to go to the police, or the hospital. They stopped by Joshua's brother's house to get shoes. R.p.671, lines 12-17. Joshua was upset and crying the whole time. At one point, he tried to jump from the car. Prather pulled over into a Chinese food restaurant parking lot and told Joshua he needed to calm down. Joshua jumped from the car and ran across the Plaza and into Calloway's bar. R.p.672, lines 8-20. Prather jumped out and followed him into the bar. He convinced Joshua that he needed to go to the hospital, and then Prather drove him there. R.p.673, lines 23-25.

At the hospital, Prather told a nurse, Donna Sharpe, what happened. R.p.673, lines 18-25. He also told law enforcement what happened at Gerald Stewart's house. R.pp.674-676. The entire time that Joshua Phillips was at the hospital, and while Prather was speaking to law enforcement, Phillips never told anyone that Prather had "made him do it."

ARGUMENTS

I. THE TRIAL COURT JUDGE ABUSED HIS DISCRETION, AND VIOLATED PRATHER'S RIGHTS TO DUE PROCESS, BY ALLOWING THE STATE TO PRESENT A "CRIME SCENE ANALYST" WHEN HIS TESTIMONY WAS (1) NOT PROPER REBUTTAL TESTIMONY, (2) NOT SCIENTIFICALLY VALID, AND (3) INVADED THE PROVINCE OF THE JURY.

In rebuttal, and for the first time, the State offered SLED agent Paul LaRosa as an expert witness based on his involvement in crime scene investigations. The state tendered him as an expert in "crime scene analysis" which is another term for "profiling." R.p.732, lines 16-17.³ See James Aaron George, Note, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results*, 61 Vand. L. Rev. 221, 226 (2008) (explaining that in the 1970's, Howard Teten and Patrick Mullany, members of the FBI's Behavioral Analysis Unit, pioneered a technique known as "offender profiling" in which profilers examined crime scenes in order to predict offender behavior and motives that would aid in offender identification). LaRosa was not involved in this investigation, nor was he called as a witness during Prather's first trial. LaRosa conceded his testimony was non-scientific but was offered as "experience" based. He further conceded during pre-admission *voir dire* by defense counsel that his review of the case was limited to crime scene photos/ video and the courtroom testimony of Prather and Ron Rabon. LaRosa did not review the full investigative file, was not involved in investigating the case, and did not interview any witnesses. Critically,

³ The State argued, "The State intends to call Paul LaRosa, who is a SLED agent who is an expert on crime scene analysis, and that would include crime scene interpretation and also artifacts and the crime scenes are left describes the behavior and the motives of the people who have committed a crime. He will not be presented to develop a profile or to say that anybody is consistent with that type of individual, just to explain the crime scene." R.p.732, lines 11-25.

despite his testimony that focused on the “psychology” of the participant(s) of the crime, he never reviewed the available mental health records of Phillips who has a long history of mental health issues. See *Motion to Require Psychiatric Examination of Joshua Phillips*, filed April 27, 2009 in the Lexington County Clerk of Court’s Office. Additionally, his testimony did not establish any sufficient training in the area of psychology, especially important as his opinion was cloaked in putting himself into the minds of the assailants as there were no witnesses or supporting physical evidence of his theory of multiple participants. Had LaRosa reviewed those records, he would have found that Phillips had a history of hallucinations and delusional behavior and was quite capable of both carving “rapist” into the decedent’s back and covering him up—all without Prather’s input.

Trial counsel objected to LaRosa’s testimony on the grounds that (1) it was not proper reply testimony, R.p.733, 751, (2) it was not scientifically valid, R.p.751, and (3) the content of the testimony invaded the jury’s province, R.p.754-55. The trial court judge overruled all of these objections.

LaRosa had never been accepted as an expert witness in crime scene analysis. R.p.747, lines 17-19. He had not been given any information relating to Joshua Phillips mental health history. R.p.748, lines 7-15. According to LaRosa, his job was limited to “get an idea of how many possible offenders could be in that scene.” R.p.747, line 23- p.

748, line 6⁴. LaRosa could not answer defense counsel's question as to the reliability of profiles in general. R.pp.748-49. LaRosa acknowledged he did not have any formal training from an educational institution in the area of psychology and that he had only completed a 30 day internship with the Department of Mental Health in that field. R.p.763, line 11. The trial court judge, however, found LaRosa's testimony admissible and "reliable for the jury to hear on the issues of staging, directed anger and recovery." R.p.754, lines 6-9.

Before the jury, the State asked:

Q: What makes you an expert in crime scene analysis?

A: I'm not quite sure—what makes—I believe the training that I've gone through, the intense crime scene work that I've already done for the state where I'm testified as a – an expert in crime scene reconstruction and assessment and the intense two-year training program that I went through, and I believe that when I was accepted by my brothers and sisters within the FBI as an equal and allowed to write criminal and crime scene analysis and profiles for the FBI with my name attached and the

⁴ LaRosa attempted to minimize the extent of his opinion in this case, despite the fact that it was a critical element that the State had to prove. The following exchange illustrates the duplicitous nature of the State's argument:

Q: You are not here to say that Mr. Prather did anything, are you?

A: That is correct. The only thing that I can say based upon what limited amount of time that I've had to do this, because I couldn't get a complete victimology, I couldn't look at their past histories, their psychological files or any of that. When I look at the crime scene I saw two offenders because we have elaborate staging in which one offender wants the world to know that this guy is a rapist. Whether he is in his mind or not that is the perception that this offender wants to give to the public that this guy is a rapist I want the world to see, and, in fact, I want the world to see so much that I'm going to put a dildo next to him to show how disgusting he is. And in direct conflict with that is another personality who is wanted to erase and undo what has happened. That is from two different personalities, which is my opinion is two different offenders." R.pp.745-46.

SLED letterhead with the FBI seal right next to it, and they allowed it to kind of go out to different agencies. I worked one in California, Utah. Those types of things where my name was attached to those people who I admire and respect and who are the leaders in the behavioral science world. I guess I want to say—I mean, it's not my decision to say, but I believe that my training and experience has put me up there. I'm on equal plain with my peers within the FBI."

R.pp.761-62.

LaRosa then opined that two people had to be involved in "staging" the crime scene. Specifically, he testified that one person carved "rapist" into the decedent's back while another person, feeling the shame, covered him with a blanket.

LaRosa's "staging" testimony was used to support the State's otherwise unsupported theory that Phillips and Prather acted in concert, and contradicted Prather's testimony that he was not involved in, nor did he witness, any carving of the word "rapist" on Stewart and had no knowledge as to Stewart's being covered in a blanket. It also contradicted Prather's testimony that he left Phillips in the house alone with the decedent. In short, this testimony was offered to impeach Prather's version of events regarding Stewart's death that the State was well-aware of since he testified on his own behalf at his first trial.

LaRosa's testimony was critical to the State's theory of the case, as evidenced by the Solicitor's closing argument:

Let's talk about staging. Staging. You heard Paul LaRosa, the last witness that we called up, talked to you about staging. He's a behavioral unit at SLED. Staging is the attempt to misdirect you from what happened. That's exactly what this is. This is a beating and a killing. It wasn't a rape and a beating. It wasn't a self-defense and a beating. You'd call the police on that. I just—this guy was coming at me and I hit him. He's not breathing. I didn't hit him that hard, but he's not breathing.

Look to his actions and to his words. Carving into him, putting a dildo on him, flicking a cigarette, making burns. Hey, world, this is a rape staging. Is that what somebody who had really been raped would do? If Josh Phillips really did that, if he was so mad and so angry because he thought he'd been violated by Gerald Stewart, is that what he would have done or would it have been worse? Would he have plunged the knife into him, over and over to kill him and spell out the word rapist? Would he have mutilated him? Cutting off or disfiguring a body part that offended him, his mouth or his genitals? Would the dildo be under his armpit or would it be somewhere else? It's staging. It didn't happen.

That's not the reason Gerald Stewart was killed. It was not the reason he was beat. An attempt to cover him up with a blanket and pillow. I think he called it undoing. A different behavior, a different person. Two people with one leader, one follower. He told you his story. If we have proved to you beyond a reasonable doubt that it's not true, he's guilty of murder.

R.pp.833-34.

LaRosa's whole line of testimony was wholly improper. First, it is not appropriate rebuttal testimony. The State cannot show any reason why LaRosa as not presented during its case-in-chief. This was Prather's second trial. He testified at the first one, and to the same matters he testified to in this one. It is disingenuous for the State to contend that this was appropriate "reply" testimony because Prather took the stand to testify. R.p. 733. The State's argument would allow the State a "free-for-all" any time a defendant exercises his right to testify on his own behalf. See *State v. Watson*, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003) (noting that "no sufficient reason for failing to introduce in case-in-chief" is appropriate grounds upon which to exclude the evidence in discretion of judge). Additionally, introduction of this testimony did much more than simply "rebut" Prather's testimony, it introduced a whole new forensic field that trial counsel could not have anticipated. This area of behavioral science is

extremely controversial and complex. See Angela N. Torres, Marcus T. Boccaccini, and Holly A. Miller, *Perceptions of the Validity and Utility of Criminal Profiling Among Forensic Psychologists and Psychiatrists*, *Professional Psychology: Research and Practice* 2006, Vol. 37, No. 1, 51-58, 57 ("The finding from the current study that approximately 70% of mental health practitioners believed that profiling or criminal investigative analysis was not a valid technique is nearly identical to Bartol's (1996) finding from nearly 10 years ago that 70% of police psychologists "seriously questioned" the validity of profiling"). And see James Aaron George, Note, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?*, 61 *Vand. L. Rev.* 221, 239 (2008) (noting members of the scientific community criticizing the profilers' misrepresentation of established psychological theory, as current psychological research does not support profilers' presumptions that traits are consistent across time and situations and that different traits predictably relate to different personality types, as well as the lack of any empirical support for their claims). Also see David V. Canter, Laurence J. Allison, Emily Alison and Natalia Wentink, Article, *The Organized/ Disorganized Typology of Serial Murder, Myth or Model?*, 10 *Psychol. Pub. Pol' y & L.* 293, 297 (2004) (indicating that FBI agents, other than those who proposed the dichotomy, acknowledge that further research is required and that 20 years later, there has not been any published research on the reliability and validity of the field). Trial counsel was simply incapable of responding to the State's introduction of this testimony that is, ostensibly, rooted in scientific principles. Additionally, the State did not even place LaRosa's name on its witness list, so there was no way counsel could have known what the State had in store.

The trial court judge abused his discretion by allowing this testimony to be admitted at trial.

But also, this area of “forensic science” is not scientifically valid. As the above articles show, this kind of testimony has not been scientifically validated and is extremely highly controversial. See National Research Council (U.S.). 2009. *Strengthening forensic science in the United States: a path forward*. Washington, D.C.: National Academies Press, 113. (The NAS report) (“To confirm the validity of a method or process for a particular purpose (e.g. for a forensic investigation), validation studies must be performed”).

Additionally, the testimony invaded the province of the jury because it was offered to resolve the critical issue in the case—Prather’s intent. The State pursued a murder prosecution against Prather necessitating that it prove “malice” beyond a reasonable doubt. LaRosa’s testimony did just that, by informing the jury that he perceived “two personalities” in the crime scene—one who was intent on brutalizing the victim, and the other to “undo” that brutalization. The Solicitor brought home the point when he argued in closing that if Joshua Phillips had been the brutalizer, he would have done much worse. The solicitor used this “staging” evidence to “prove” that Prather maliciously killed the decedent, and that there was “one leader, one follower.” R.p.833.

LaRosa’s testimony was additionally improper on the basis of improperly invading the jury’s province because expert testimony relating to the mind of the defendant or his or her guilt is inadmissible in South Carolina. *State v. Commander*, 3967

S.C. 254, 269, 721 S.E.2d 413, 421 (2011) ("Consequently, we adopt a rule whereby an expert in forensic pathology's opinion testimony as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence"). LaRosa's testimony went directly to the intentions of the "personalities" he "perceived" in the crime scene. It was improper under the law.

In his Order Denying Defendant's Motion for a New Trial, the trial court judge ruled that neither *Brady v. Maryland*, 373 U.S. 83 (1963) nor South Carolina Rules of Criminal Procedure, Rule 5 allow for the discovery of witness lists. He further ruled that since the State was not required "to try the same case the second time around" that the ground for new trial was without merit. The trial judge's ruling failed to account for the impact this testimony had on the trial, and counsel's inability to sufficiently meet the challenge in order to protect Prather's right to fair trial. The ruling fails to recognize that the judge should use his or her discretion in allowing the testimony. The judge, for example, did not consider why the State waited, in this trial, before it "sprung" this witness in rebuttal when it reasonably should have understood that Prather would testify on his own behalf. Nor did the judge consider why the State failed to disclose this witness, but otherwise provided a full witness list to the court prior to the start of trial. Nor did the judge consider that LaRosa's field of so-called expertise was complex and controversial, and that defense counsel would have needed additional resources to meaningfully mount a challenge to it. The trial court judge abused his discretion

because he did not take into consideration the wide range of factors that should have informed his decision-making in allowing this evidence into trial.

Additionally, the trial court judge found LaRosa sufficiently qualified to give his opinion as a "crime scene analyst" and that his testimony was reliable. The trial court judge found that he "did not offer profile evidence or evidence of victimology. Importantly, Agent LaRosa did not offer an opinion as to who the killer was or what role the Defendant played, if any, in the murder." R.p.987. This finding overlooks the use to which the State put LaRosa's testimony. LaRosa provided the only evidence suggesting that Prather and Phillips acted in concert, making them both criminally culpable. Without this linchpin, holding the State's case together, Prather would likely have been found either not-guilty, or the jury would not have convicted (as in the first trial). And also, the judge's ruling understates the significance juries attach to what experts have to say in the courtroom. See *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against the potential to mislead or confuse."); *United States v. Hines*, 55 F. Supp.2d 62,64 (D. Mass. 1999) ("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think, and give more credence to the testimony than it may deserve").

Again, the Solicitors closing argument illustrates just how valuable the State found this testimony in arguing for conviction (even as it told Judge McMahon a week

later that Phillips had confessed to scratching rapist and covering up the body which LaRosa testified indicated the presence of "two personalities.")

The trial court judge also committed significant factual errors in his order. He stated:

The Court finds that staging and undoing are basic and accepted concepts of scene reconstruction and assessment, both areas in which Agent LaRosa testified previously as an expert.

R.p.987.

In fact, the whole behavioral science field is highly controversial—70% of mental health practitioners find it "unreliable"—and LaRosa had never been qualified as an expert witness in crime scene analysis prior to this trial. The trial court judge erred in allowing the State to present the testimony of Paul LaRosa in rebuttal, and this Court should reverse Prather's convictions and remand for a new trial.

II. THE TRIAL COURT JUDGE ADDITIONALLY ABUSED HIS DISCRETION WHEN HE ALLOWED THE TESTIMONY BECAUSE IT WAS NOT PRODUCED IN DISCOVERY PURSUANT TO SOUTH CAROLINA RULES OF CRIMINAL PROCEDURE, RULE 5, OR BRADY V. MARYLAND.

The trial court judge, in his order denying Prather's motion for a new trial, found that the State did not violate *Brady v. Maryland*, 373 U.S. 83 (1963) or SCRCrimP, Rule 5 when it failed to disclose LaRosa's testimony prior to trial. The trial court judge erred because this evidence was material to Prather's defense and therefore should have been produced.

III. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT AND VIOLATED PRATHER'S RIGHT TO DUE PROCESS, WHEN IT "SANDBAGGED" THE DEFENSE WITH LAROSA'S REBUTTAL TESTIMONY.

LaRosa was not a witness at the first trial that resulted in a hung jury, and he was not listed as a witness by the State for the second jury. The State's actions constituted impermissible "sandbagging" because the defense did not have notice of the testimony and was unable to prepare for it. "Sandbagging" occurs when a prosecutor argues new theories or makes new arguments not previously made that takes defense counsel by surprise and affords no opportunity to answer or clarify what the prosecutor said. *Moore v. United States*, 344 F.2d 558 (D.C. Cir. 1965); *Hall v. United States*, 540 A.2d 442 (D.C. App. 1988).

The prosecutor's duty in a criminal prosecution is to seek justice. See *Berger v. U.S.*, 295 U.S. 78, 88 (1935). Therefore, the prosecutor should "prosecute with earnestness and vigor," but may not use "improper methods calculated to produce a wrongful conviction." *Id.* Prosecutorial misconduct justifies reversing a conviction when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Appellate courts consider a number of factors in evaluating the seriousness of misconduct, including whether the prosecutor's misconduct was deliberate or accidental,⁵ the degree to which the prosecutor's conduct

⁵ See *Or. V. Kennedy*, 456 U.S. 667, 676 (1982) (where government conduct intended to "goad" defendant into moving for mistrial, defendant may raise double jeopardy in second trial).

may have prejudiced the defendant,⁶ and whether the weight of the evidence made conviction certain absent the improper conduct.⁷

Here, there is no doubt but that the Solicitors made a conscious decision to “spring” LaRosa on the defense at the last possible moment, and with the least amount of warning to them. They strategically called LaRosa at a point in the case when the defense was unable to meet the challenge—rebuttal. It was calculated and intentional “sandbagging.” LaRosa was not even included on the witness list. And the prejudice to Prather was enormous since (1) he was unable to respond to it appropriately, and (2) because there was so little evidence to show he was guilty of anything, much less murder.

In *Coreas v. United States*, 565 A.2d 594 (D.C. App. 1989), the prosecutor in his initial closing argument in a murder case asserted that the defendant’s story was inconsistent with the autopsy evidence and this pointed to the defendant’s guilt. The defense then argued self-defense. The prosecutor, for the first time in his rebuttal

⁶ See *U.S. v. Perlaza*, 439 F.3d 1149, 1172-73 (9th Cir. 2006) (conviction reversed because of intentional and improper burden-shifting comment); *U.S. v. Watson*, 171 F.3d 695, 700 (D.C. Cir. 1999) (conviction reversed because prosecutor’s misstatements of defense witness’s testimony substantially prejudiced defendant despite curative instructions).

⁷ See *U.S. v. Richards*, 719 F.3d 746, 766-67 (7th Cir. 2013) (conviction vacated because prosecutor’s improper propensity argument “call[ed] into question the fairness of [defendant’s] trial” and limiting instructions “did little to mitigate the prejudice”); *U.S. v. Conrad*, 320 F.3d 851, 856 (8th Cir. 2003) (conviction reversed because prosecutor’s improper remarks during trial had cumulative effect that “substantially impaired the defendant’s right to a fair trial,” evidence against the defendant was not overwhelming, and curative instructions were insufficient to protect defendant from substantial prejudice).

summation argued an entirely new theory, i.e., that the defendant was “lying in wait” for the victim, a theory arguably supported by the autopsy report and the trajectory of bullets. The appellate court concluded that the prosecutor’s summation sandbagged defense counsel and constituted plain error. Additionally, by not affording defense counsel an opportunity to respond, a prosecutor’s misconduct during rebuttal summation may have a greater capacity to deny a fair trial. *United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir. 1996) (inflammatory rebuttal summation mandates reversal). And see *Wallis v. State*, 546 S.W.2d 244 (Tenn. Crim. App. 1976). In *Wallis*, the prosecutor made a perfunctory opening argument. After the defense waived closing argument, the trial judge allowed the prosecutor to make a full argument and refused to allow the defense to rebut the entirely new material. The court reversed, finding a violation of the defendant’s right to be heard by counsel.

Here, the State took advantage of being allowed an opportunity to put up additional evidence after Prather testified and once he had no opportunity to address the concerns raised by its expert. It is a completely disingenuous use of “rebuttal” testimony. The State simply wanted to be allowed to introduce new evidence without giving Prather an opportunity to respond. LaRosa’s “ambush” testimony was the improper fulfillment of the State’s trap to surprise the defense and complete its new theory of prosecution. The prejudice to Prather by not being able to refute or challenge the testimony was insurmountable.

The trial court judge erred in his Motion Denying New Trial when he concluded that Prather could not show the State “sandbagged” him because the State, nor the

Defendant, are required to try "exactly the same case the second trial around." R. 986. Again, the trial court judge abused his discretion by failing to consider other factors. Again, he failed to consider why the State waited, in this trial, before it "sprung" this witness in rebuttal when it reasonably should have understood that Prather would testify on his own behalf. Nor did the judge consider why the State failed to disclose this witness, but otherwise provided a full witness list to the court prior to the start of trial. Nor did the judge consider that LaRosa's field of so-called expertise was complex and controversial, and that defense counsel would have needed additional resources to meaningfully mount a challenge to it. The trial court judge abused his discretion because he did not take into consideration the wide range of factors that should have informed his decision-making in allowing this evidence into trial.

IV. THE TRIAL COURT JUDGE ABUSED HIS DISCRETION BY ALLOWING THE STATE TO INTRODUCE PRATHER'S CO-DEFENDANT'S INADMISSIBLE HEARSAY BECAUSE (1) IT WAS INADMISSIBLE UNDER THE SOUTH CAROLINA RULES OF EVIDENCE, (2) IT WAS UNRELIABLE, (3) IT WAS IRRELEVANT, AND (4) ITS ADMISSION VIOLATED PRATHER'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM IN VIOLATION OF THE EIGHTH AMENDMENT AND SOUTH CAROLINA LAW.

At trial, the State introduced portions of co-defendant, Joshua Phillips' statements, wherein Phillips misspelled "rapist." Captain Mark Jones testified that he observed Phillips write the words. The evidence was offered to "prove" that Prather carved "rapist" into the decedent's body as evidenced by Phillips' misspelling the word.

The State was clear that it used this testimony to "prove" that Prather was the guilty party. The solicitor argued in closing:

So what we do know? Somebody pulls up his shirt and pulls down his pants, because this is the way the police found him. Pants up, shirt down, the word rapist not visible. So somebody either dressed him after the fact or they pulled it down while they did it. They took a knife, and not a butter knife, but a share-pointed blade and carved the word rapist. And Mr. Prather told me he saw rapist up there. You heard him say that. R-A-P-I-S-T, rapist. Thirteen years in school, he knows how to spell rapist. He could read.

What do we know about Josh Phillips? We know that Investigator Mark Jones with the West Columbia Police Department saw him write the word rapist or write a word that looks like rapist, R-A-P-E-I-S-T. That is not what was carved into the back of Radar. So either Josh Phillips is a follower, who's not real bright, who doesn't know how to spell or he's a mastermind at everything on his own, even to the point of spelling the word rapist wrong. And if that's what you think then he's not guilty and he didn't have anything to do with it.

R.pp.831- 832.

1. The Statement was Rank Hearsay

These statements were inadmissible because they were rank hearsay, SCRE, Rule 801(c). They were admitted to prove that Prather carved "rapist" into the decedent's buttocks. In its order denying the Motion for a New Trial, the trial court denied that claim because "the word alone does not constitute "an assertion":

The fact the word was taken from a statement written by the Co-Defendant is irrelevant. The statement **in its entirety** would certainly constitute his assertion of what **really** happened and who was **truly** responsible for the Victim's death. However, it was **never** introduced at trial.

R. 976 (emphasis in original).

According to SCRE, Rule 801:

(c) "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.

(a) "A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

Officer Jones was allowed to testify that co-defendant Phillips misspelled "rapeist" in the statement he gave to law enforcement in connection with this investigation. While the trial court did not allow the statement to be admitted, it did allow an enlarged portion of that statement purporting to be Phillips's misspelling into evidence.

Phillip's statement to law enforcement is hearsay because it was a statement made by him to law enforcement, and Phillips was not present to testify to the statement. SCRE, 801(c). The officer's testimony pertaining to Phillips' statement is also hearsay because the officer testified to a statement that was offered to prove the truth of the State's theory, that Prather carved the word into the decedent, and that the two co-defendants were equally culpable in the death of the decedent. Neither statement falls within an exception to the hearsay rule. The trial court judge erred when he allowed this evidence to be presented to the jury.

2. The Statement was Unreliable

Phillips' purported misspelling of "rapist" in his statement to law enforcement is unreliable to show that Prather must have been the party who carved the properly spelled "rapist" into decedent's back. Reliability is . . . a due process concern." *White v. Illinois*, 502 U.S. 346, 363-64 (1992). The Due Process clause of the federal Constitution requires that criminal convictions be reliable and trustworthy. See *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

Here, the State's argument that Prather must have been the "carver" because Phillips misspelled "rapist" in his statements was pure, baseless speculation (and a position they disavowed a week later in Phillip's guilty plea).

3. The Statement was Irrelevant⁸

Phillips' purported misspelling of "rapist" was additionally irrelevant to show that Prather carved "rapist" into the back of the decedent. Under SCRE, Rule 401, 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." Just because "rapist" was spelled correctly on the decedent's back, it does not follow that Prather carved the word simply because his co-defendant misspelled it twice in a written statement to police (as the State knew since it told Judge McMahon that Phillips confessed to carving it, even though he also misspelled it in his statements). There is no way to know why Phillips misspelled the word in his statement—he may have been intentionally trying to set Prather up to look like the guilty party, for example. Or maybe Phillips has a learning disability and does not consistently spell words. Or maybe he was tired and sloppy when he wrote his statement. Or maybe Ron Rabon, who was at the house when Stewart died, carved the word into buttocks. This evidence was exceedingly

⁸ Although counsel did not object to the admission of this evidence on the basis of "irrelevancy," the trial court judge, in his Order, addressed it on that ground. The order states: "In this case, there were two people charged with murder. The misspelled word "rapeist" was clearly significant and probative because the word carved on the Victim's back was spelled correctly. This evidence implicates the Defendant as being involved in the carving of the word on the Victim's back." R. 981.

speculative and based on the principle of false alternatives that either Phillips knows how to spell "rapist" and therefore either he or Prather must have carved "rapist" into the decedent's buttocks, or Phillips does not know how to spell "rapist" and therefore Prather must have done so.

4. The Statement violated Prather's Right to Confront the Witnesses Against Him.

Phillips gave his statement to law enforcement in connection with the investigation into Stewart's death and is therefore "testimonial." *Crawford v. Washington*, 541 U.S. 36 (2004) (defining the "core class of testimonial statements" to include affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially). If an out of court statement is testimonial, then under the Confrontation Clause it is not admissible against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront the witness. *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S.Ct. 2705 (2011).

The trial court judge's order found that the admission of this evidence did not violate Prather's confrontation rights because "[t]he word 'rapeist' does not say anything about what transpired or who killed the Victim." R. 976. But, the trial court judge also allowed it because he ruled it was probative of who carved "rapist" into the decedent's back. R. 981. The State clearly, unequivocally used that part of the statement to show that Prather carved the word into the decedent's buttocks. It does not matter that it was only one word, versus an entire sentence or the entire statement. A

confrontation clause analysis does not depend on the character of the evidence, but on its purpose.

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 indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, Hammon v. Indiana, 547 U.S. 813 (2006).

Here, law enforcement was not responding to an ongoing emergency; they were engaged in an investigation centered on determining what happened to Gerald Stewart. The fact that the State only elicited one part of that statement does not negate its function which was to memorialize events and establish facts. And indeed, they used it in that way—to establish the “fact” of this investigation that Prather, ostensibly, carved the word rapist. For reasons argued elsewhere, they used it improperly because the State’s use was irrelevant and unreliable, but that does not mean the statement was therefore “nontestimonial.”

Additionally, the trial court judge found that Captain Jones was the relevant witness for Confrontation analysis. R. 978. That is not correct. Prather had the right to cross-examine Joshua Phillips to show the jury how or why he spelled “rapeist” in the manner he did so in his statement, and have the jury assess his credibility when he answered.

The trial court judge analogized the issue to “writing exemplars” which are non-testimonial. R.pp.978-79. This comparison is misleading—the question here was not

whether the carving on the decedent resembled either Prather or Phillips' writings (which is the field of expertise implicated in the questioned documents forensic area), but whether the State used Phillips writing (his misspelling) to further its assertion, or claim, that Prather was the "carver." A better analogy would be tattoos. Clearly, the tattoos that a defendant may have are "nontestimonial" and the State can introduce them against a defendant at trial. But what the State did here was essentially to show the jury Phillips' "tattoos" and argue they have probative value in the case against Prather. It is the use of the statement, which was secured by law enforcement during an investigation, and not in the course of an emergency, that gives the statement its testimonial character. Its introduction at Prather's trial, against him, without the opportunity to confront Phillips, denied him his rights under the Confrontation Clause.

Additionally, its introduction was exceedingly prejudicial, as it was used by the State in its closing argument as its "proof" that Prather was the more malicious of the two, the "carver."

V. THE TRIAL COURT JUDGE ERRED, AND PRATHER WAS DENIED HIS RIGHT TO DUE PROCESS, WHEN HE DENIED PRATHER'S MOTION FOR A DIRECTED VERDICT BECAUSE THE EVIDENCE DID NOT RISE ABOVE A "MERE SUSPICION" THAT PRATHER CAUSED THE DECEDENT'S DEATH.

The State's pathologist, Dr. Janice Ross, testified that the decedent could have died at any time from his many health conditions regardless of whether there was a fight, and the toxicologist testified that the decedent's alcohol level could have been fatal in and of itself. The death here could also have been caused by the undisputed physical fight earlier in the night between Joshua Phillips and Gerald Stewart. Stewart

was 285 pounds and had a host of medical issues including an enlarged heart⁹, sclerosis of the liver, enlarged spleen, evidence of diazepam¹⁰ in his system, history of alcoholism, and a blood alcohol level of .279. The level of alcohol measured by reading his ocular fluid was .342. R.p.357, lines 15-19. Moreover, as the pathologist stated, the injuries inflicted on the decedent (i.e. the superficial cuts to the back spelling "rapist") were not fatal injuries. He was, admittedly, "in poor health." R.p.344, lines 16-17. Even the pathologist had difficulty determining the precise cause of the cardiac arrhythmia. She testified that it could have been due to suffocation. R.p.351, lines 19-24. She testified that she was not competent to testify to the effect the Valium would have had on Stewart in conjunction with the alcohol in his system. R.p.361, lines 12-15. She also testified that she was not qualified to testify as to the amount of stress Stewart would have experienced with an alcohol level of .342 who also had Valium in his system. R.p.363, lines 4-11. She stated she could not answer that because she is not a "clinician." R.p.363, lines 7-8. The State's other witness, a forensic toxicologist, testified that alcohol and diazepam have a "synergistic" effect, meaning that the consumption of alcohol and the drug "is greater than the combination of the two."¹¹ R.p.427, lines 15-25.

⁹ "The heart was almost twice normal size." He also had "a lot of fluid in the lungs." R.p.342, lines 8-12.

¹⁰ Also known as "Valium."

¹¹ The forensic toxicologist also testified that she thought Stewart probably consumed between 18-20 drinks that night, given the alcohol level in his blood. R.p. 422, lines 12-15. She also testified that if someone consumes enough alcohol, it shuts down the system by depressing respiration. "So, ultimately, that is generally how you die from drinking too much is you just stop breathing." R.p.429, lines 2-6.

Additionally, Dr. Ross was not informed of the earlier physical assault between Joshua Phillips and Stewart, so she was not able to opine whether Stewart's ribs were fractured earlier in the evening or when Prather had his encounter with Stewart. R.pp.364-65. Aside from Dr. Ross's testimony, which was largely uninformed since the State did not tell her of the previous fight, and she apparently did not take into consideration the toxicology results, there was no evidence offered to show that Prather's altercation with Stewart caused him to die.

"The defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased. The defendant's act need not be the sole cause of the death provided that it be a proximate cause actually and contributing to the death of the deceased." *State v. Burton*, 302 S.C. 494, 397 S.E.2d 90 (1990). In other words, "one . . . is deemed to be guilty of the homicide if the injury inflicted contributes immediately to the death of the deceased. *Id.* at 498 (internal citations omitted). Here, in the light most favorable to the State, the State failed to prove an essential element of its case—proximate cause between the death of the decedent and Prather's actions.

The trial court judge erred in not granting Prather's motion for a directed verdict because the evidence presented did not raise more than a mere suspicion that Prather was guilty of murder. The only evidence law enforcement had was that Gerald Stewart was deceased in his home with the word "rapist" superficially scratched into his buttocks, and that some of his belongings were found in Prather's car. They also knew that Prather and Joshua Phillips had arrived at the hospital asking to have Phillips tested for a possible rape. They also had Prather's statements that he got into a physical

altercation with Stewart when he found him naked and making lewd remarks about Phillips. They also knew that Phillips had assaulted Stewart earlier in the evening. They knew that Stewart was in extremely poor health, and had been drinking an excessive amount of alcohol only a week or so after leaving rehab. They also knew that he died of a heart condition. This evidence did not constitute substantial circumstantial evidence supporting the charge of murder or robbery.

VI. THE STATE'S ACTIONS IN PURSUING FACTUALLY INCONSISTENT THEORIES IN PRATHER AND PHILLIPS' CASES DENIED PRATHER HIS RIGHT TO DUE PROCESS.

In zealously pursuing their conviction against Prather, the State pursued different theories regarding who carved "rapist" into the decedent's back. One week after his trial resulted in a conviction, the same solicitors who tried Prather—Rick Hubbard and Shawn Graham—allowed Joshua Phillips to enter a negotiated plea before a different judge, the Honorable Knox McMahon. At this guilty plea, the State made a number of factually inconsistent statements that undermine the integrity of Prather's conviction.

As Hubbard gave the factual basis for the plea, he stated this:

The final statement was October 15th of '09. Right on the cusp on the trial of Robert Jarad Prather. He admits at that point—and Your Honor, this was another incident where we brought law enforcement in, they Mirandized him, he was very emotional. Law enforcement said **this is probably the closest thing to the truth**, but, Your Honor, we don't really know. We just know he implicates himself again . . .

. . . He said he is the one—Mr. Phillips is the one that put the pillow over Mr. Stewart's head to smother him. He said Jarred (sic) Prather told him to do that. He said there was no need to check his pulse after that because he knew he was dead. **He said Mr. Prather gave him a knife and**

said, carve the word rapist. He says in that instance he did it . . . And as far as the blue blanket there, he said he's the one that covered Gerald Stewart's body" (emphasis added).

R.pp.1027-28.

As noted in previous arguments, at Prather's trial, the State introduced portions of Joshua Phillips' statements, wherein Phillips misspelled "rapist." Captain Mark Jones testified that he observed Phillips write the words as he was giving his statement. The evidence was offered to "prove" that Prather carved "rapist" into the decedent's body as evidenced by Phillips' misspelling the word. The State was clear that it used this testimony to "prove" that Prather was the guilty party as evidenced by the Solicitor's closing argument.

The significance of this statement cannot be understated in the context of this case. The sole evidence that the State presented that would have tended to indicate that Prather intended to harm the decedent was this supposed involvement with the decedent's body. Prather's testimony has remained consistent throughout which is that, after a long day of drinking and consuming drugs with Phillips, the decedent, and the roommate, he entered the house early in the morning and encountered the decedent, naked, and with his friend passed out in the bedroom. Fearing that his friend had been raped by the decedent, he assaulted the decedent and took Phillips to the hospital. The State, however, hypothesized that robbery was the motive. Robbery, of a single, unemployed gay man who waits for checks to come in the mail so he can catch a cab to buy booze. Robbery, it claims, of a man whose funds were kept in trust with a neighbor because he was not responsible with money. R.p.379.

In fact, so convinced of Prather's guilt and defying common sense, Detective Matt Edwards concluded that Prather must have been lying to him about the encounter with the decedent because he, Prather, was not covered in blood, and it had been a very violent scene (even though the lack of blood on Prather corroborated his version of events that he was out in the car when Phillips must have carved into the decedent's body):

I had been to the crime scene and it was a violent scene. And I said it struck me as odd that he was wearing a, what looked like to me, a spotless white tee shirt. And I made an assumption that he had changed. And my goal was to get the clothes that he was wearing during the assault. And so my line of questioning was geared toward that, you know, where did you change? Where's the clothes you were wearing? Why did you change, that kind of thing . . . That just didn't make sense to me. Again, I said that this was a bloody crime scene and that he, himself, had described being there. And assaulting Mr. Stewart. It made no sense to me. I would expect to see blood on the tee shirt, but I didn't. I challenged him about that. And I told him that he was lying.

R.p. 605, lines 4-23.

In addition to taking factually inconsistent positions at Prather's trial and Phillips' plea with respect to the carving, the Solicitors also led Judge McMahon to believe that the allegation of rape was without any support. But that is not accurate. The State's own witness testified that he observed sexual contact between Joshua Phillips and the decedent on two different occasions that night.

HUBBARD: He pretty much stuck to that story with some variations. Mr. Phillips, the whole time, never really spoke. He submitted to a rape protocol test, which came up negative. No physical signs of rape. Both the doctor and the nurse that evaluated him were saying, we don't see any signs of rape. He was interviewed at the —

THE COURT: This would have been anal intercourse?

HUBBARD: Yes, sir—now, because they never really described what might have happened, so they checked for everything.”

R.p.1022, lines 14-23.

The State’s own witness at Prather’s trial undermines the impression they sought to give Judge McMahon. Ron Rabon testified that he was the decedent’s roommate for the four days preceding the decedent’s death. R.p.513, lines 23-24. Rabon and the decedent had met in treatment where they were both being treated for alcohol and drug abuse. R.p.513, lines 9-22. The decedent invited Rabon to stay at his home for \$100 a week because he needed someplace to stay. R.p.514, lines 11-22. At the decedent’s house, Rabon found a male sex tape, and asked the decedent about it. R.p.516, lines 19-20. The next night, Rabon encountered the decedent and another man watching the tape together. R.p.517, lines 21-25. He confronted him, and told the decedent he wanted his money back and that he was going to move out. R.p.518, lines 1-8. Shortly after that, Rabon testified that the decedent was waiting for a check to arrive in the mail. When it came, the decedent started calling around for a cab, so he could cash the check and get beer and liquor. R.p.519, lines 16-19. This happened earlier in the day the night he died.

Rabon testified that Joshua Phillips passed out, R.p.531, lines 11-15, and that he and Prather took him and placed him on the couch. Corroborating Prather’s testimony, Rabon stated that Prather left the apartment. R.p.531, lines 16-17. Rabon went back to his room. He exited his room later and encountered Joshua and the decedent engaged in sexual activity in the living room. R.p.532, lines 15-16. Rabon went back to his room,

and then exited it again. This time, he saw Joshua and the decedent in the bedroom. The decedent was not wearing any clothes. R.p.533, lines 13-14. The Solicitor's remarks to the judge that essentially the rape claim was without any basis, was improper and factually inconsistent with their own evidence.

Prather could not have known that the prosecution was going to take factually inconsistent positions in these two prosecutions because the State allowed Phillips to plead to a negotiated 20 year sentence **after** his trial. The Solicitors did not inform the trial court judge at Prather's trial that Phillips had made a statement in which he claimed he performed the contested carving. Prather was therefore unable to use their statements to argue against the admission of Phillips' statements in which Phillips, according to the state, misspelled "rapeist."

Prather's conviction is a violation to his right to due process, both in the sense that it implicates his right to a fair trial, but it also violates substantive due process because maintaining irreconcilable convictions under the facts of this case shocks the conscience. See *Drake v. Kemp*, 762 F.2d 1449, 1470 (Clark, J., concurring) (prosecutorial inconsistency implicated defendant's Fourteenth Amendment right to a fundamentally fair trial); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (Kozinski, J., dissenting) (remarking that there is something troubling about a sovereign convicting two defendants of a crime committed by one person), *rev'd*, 523 U.S. 538 (1998); *Smith v. Groose*, 205 F.3d 1045, 1053-54 (8th Cir. 2000) ("an inconsistency must exist at the core of the prosecutor's case against defendants for the same crime"). Here, unlike Drake, Prather was denied a full opportunity to confront the prosecution's inconsistencies

because he did not know of them until after his trial was finished. This is a much different case than one in which the prosecution discloses its inconsistencies. See *Bradshaw v. Stumpf*, 545 U.S. 175, 191-92 (2005) (Scalia, J., concurring, "The Bill of Rights guarantees vigorous adversarial testing of guilt and innocence and conviction only by proof beyond a reasonable doubt. These guarantees are more than sufficient to deter the State from taking inconsistent positions; a prosecutor who argues inconsistently risks undermining his case, for opposing counsel will bring the conflict to the factfinder's attention"). See *Hearn v. Commonwealth*, 2008 WL 3890035 (Ky. Aug 21, 2008); *Hammond v. United States*, 880 A.2d 1066, 1106 (D.C. 2005), abrogated in part on other grounds by *Davis v. Washington*, 547 U.S. 813 (2006). The State's taking these inconsistent positions violated Prather's right to due process because they clearly knew that Phillips both carved "rapist" and covered the decedent's body, yet they argued for the admissibility of Officer Mark Jones testimony and LaRosa's testimony because it claimed Prather did these things. The State has no legitimate interest in behaving in this manner, and it has violated Prather's rights to due process.

VII. THE TRIAL COURT JUDGE ABUSED HIS DISCRETION, AND PRATHER WAS DENIED DUE PROCESS OF LAW, WHEN HE DID NOT ALLOW PRATHER TO INTRODUCE A STATEMENT MADE BY RALPH JODY WEBB BECKNELL, AN UNAVAILABLE WITNESS, WHEN THE STATEMENT WAS ADMISSIBLE AS A PRESENT SENSE IMPRESSION OR AN EXCITED UTTERANCE, AND THE STATEMENT WOULD HAVE CORROBORATED PRATHER'S DEFENSE THAT HE WAS NOT RESPONSIBLE FOR STEWART'S DEATH.

Prather attempted to introduce a statement made by Jody Becknell to law enforcement regarding a telephone conversation he had with Gerald Stewart earlier in the evening. The testimony would reveal that Gerald Stewart told him that his ribs

were hurting at a time before Stewart and Prather had their encounter, but after Joshua Phillips and Stewart had their argument. R.p.633. In short, this testimony would have shown that Phillips had cracked ribs earlier in the night, and that Prather was not responsible for that particular injury that Dr. Janice Ross used when drawing her conclusions as to cause and manner of Stewart's death. Counsel argued it was admissible as a present sense impression or an excited utterance. R.p.633. The trial court judge excluded it:

All right. As part of the record, I'm excluding the statement. It's not admissible under the section argued by counsel. There's no way to cross-examine this witness who's dead. And in my finding, the declarant and the person he was talking to is dead. That would turn a trial on its head if we can just include such as this and put in the trial.

R.p.634.

SCRE, Rule 803, regarding hearsay exceptions, availability of declarant immaterial, states that the following are not excluded: (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, and (2) Excited utterance. 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.

The trial court judge erred by not allowing this statement into evidence because this statement was made to Becknell by Stewart between 9:15- 10:00pm shortly after the altercation with Phillips, R.p.634, lines 9-15, and it described a condition he was then perceiving—his aching ribs. It is also arguably admissible as an excited utterance since Stewart was likely still under the stress of the fight since he was still in pain. This

testimony went to a critical issue in the case—the cause of Stewart’s death. The jury had a right to know that Stewart was in pain due to a physical altercation before he and Prather had their altercation. Without it, the jury was left with the distorted view that Prather caused all of the injuries to Stewart and when that is not the case. This evidence was admissible under state law, and the trial court judge erred when he excluded it.

VIII. THE TRIAL COURT JUDGE ERRED AND VIOLATED PRATHER’S RIGHTS UNDER THE 4TH AMENDMENT AND SOUTH CAROLINA LAW WHEN HE DID NOT SUPPRESS THE COCA-COLA GLASSES AND KNIFE PURSUANT TO A FATALLY DEFECTIVE WARRANT.

The only physical evidence of property belonging to the decedent arguably found on Prather in connection with any robbery was the Coca-Cola glasses and the knife found on the passenger side of his car. These items were located by the police during a search of Prather’s car conducted pursuant to a search warrant. While a search warrant may issue only upon a finding of probable cause, the only justification for the search given in the affidavit is insufficient under any stretch of the imagination as it states only: “The above vehicle transported victim from the crime scene to Lexington Hospital for treatment.” See South Carolina Code Ann. §17-13-140 (“A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant”); *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997). The State conceded the affidavit was defective on its face. R.p.96, line 14.

Matt Edwards testified that, in addition to what was contained in the affidavit, he also told the magistrate that Prather and his co-defendant had Stewart’s wallet on

them at the hospital, and that Prather had told the hospital staff that “they had beat the man and didn’t know if he was dead or alive.” R.p.105, lines 1-4. These facts do not amount to probable cause to believe there was evidence of a crime that would be found in the car. The State testified they had a policy in place that would allow them to impound and inventory the car. R.pp.135-144. The trial court judge’s order states:

Although the search warrant may have been defective on its face, the evidence seized was admissible at trial because the search warrant was supplemented with oral testimony and the items would have been inevitably discovered when the vehicle was inventoried.

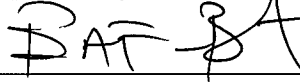
R.p.992.

The search violated the 4th amendment because the warrant was fatally defective and Officer Matt Edward’s testimony to the magistrate did not cure the defect. The trial court judge erred in not suppressing the fruits of the improper search.

CONCLUSION

For the preceding reasons presented in arguments I, II, III, IV, VII, VIII Prather respectfully asks this Court to reverse his convictions and remand his case for a new trial. For reasons presented in arguments V, and VI, Prather respectfully asks this Court to enter a judgment of acquittal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "EAT-BA", written over a horizontal line.

Elizabeth A. Franklin-Best

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable Clifton Newman, Circuit Court Judge

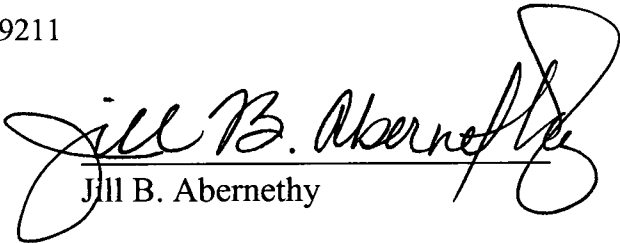
Case No. 2012-GS-32-2619
Appeal Case No. 2014-001500

Robert Jared Prather Appellant,
v.
State of South Carolina. Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Appellant's Final Brief was served by first class United States mail, postage prepaid, this 18th day of February, 2016, upon the following:

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Jill B. Abernethy

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