STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM MARLBORO COUNTY
Court of General Sessions
Honorable J. Michael Baxley, Circuit Court Judge

Opinion No. 5473 (S.C. Ct. App. Filed March 15, 2017)

Appellate Case No. 2013-001409

THE STATE, ... PETITIONER,

v.

ALEXANDER CARMICHAEL HUCKABEE, III, ...RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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II.

The Court of Appeals failed to consistently apply its harmless error analysis, finding Agent LaRosa's expert testimony was harmless error in Respondent's unlawful conduct toward a child conviction, but not his Homicide by Child Abuse charge, where the evidence cited by the court to support the former charge, along with additional evidence in the record, also supported finding any alleged error in allowing Agent LaRosa's testimony harmless as to the second charge.

STATEMENT OF THE CASE

Alexander Carmichael Huckabee, III, (Respondent) was indicted for Homicide by Child Abuse, Inflicting Great Bodily Injury upon a Child, Unlawful Conduct toward a Child, and Criminal Sexual Conduct with a Minor (First Degree). (App.pp.649–56). There were multiple pre-trial hearings in 2012, and a jury trial commenced on June 17, 2013, before the Honorable J. Michael Baxley.[1] Respondent was found guilty of all counts. Judge Baxley pronounced life sentences for Homicide by Child Abuse and Criminal Sexual Conduct with a Minor (First Degree), twenty years for Inflicting Great Bodily Injury upon a Child, and ten years for Unlawful Conduct toward a Child. All sentences were to be served concurrently. (App.p.656). Respondent then timely filed an perfected an appeal.

Thereafter, on March 15, 2017, the Court of Appeals issued an opinion in which it affirmed Appellant's conviction for unlawful conduct toward a child, but reversed his convictions for homicide by child abuse (HCA), inflicting great bodily injury upon a child, and first-degree criminal sexual conduct (CSC) with a minor. State v. Huckabee, Op. No. 5473 (S.C. Ct. App. filed March 15, 2017). The State then petitioned the Court of Appeals for rehearing. On April 21, 2017, the court denied the State's petition. (App.p.1122). This petition for a writ of certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

Respondent met Atelia Hunt ("Hunt") in an online chatroom in 2009, and after Hunt separated from her husband in 2011, the two arranged to meet. (App.pp.187–88; App.pp. 272–75; App.p.529). A relationship ensued, and Hunt moved from North Carolina to Bennettsville, South Carolina, to live with Respondent in the summer of 2011. (App.p.268; App.pp.276–78;

[1] The prosecution was initially going to try jointly Respondent and co-defendant Atelia Hunt. Hunt pled guilty prior to trial. (App.p.354).

App.p.530; App.p.532). Respondent's seven-year-old (Son), and Hunt's daughters, six-year-old Sister and three-year-old Victim, also lived in the home. (App.p.147; App.p.247; App.p.278). Victim went to stay with Hunt's parents in August 2011 as a result of a Department of Social Services ("DSS") investigation, and Victim remained there for about four weeks. (App.pp.191–92; App.pp.247–49; App.pp.282–85). In mid-September 2011, Victim returned to the home Hunt shared with Respondent and the other children in Bennettsville. (App.pp.288–89).

On October 6, 2011, just before 10:00 p.m., Hunt brought Victim to the hospital. (App.pp.71–72). Victim's head was shaven. (App.pp.72–73). The nurse who treated her in the emergency room noted bruises all over Victim's body—the top of her head, the bottoms of her feet, and her legs. (App. pp.74–75; App.pp.79–80). Victim had cigarette burn marks to her private area and buttocks. (App.p.75; App.p.337). The nurse who first encountered Victim had difficulty talking about the Victim's extensive visible injuries at trial, saying she had "never seen anything like it, and [she hoped she never would] again." (App.p.75). Despite efforts to resuscitate Victim for approximately twenty-five minutes, Victim died. (App.p.74; App.p.80).

Law enforcement officers and two DSS employees were sent to the home that night. (App.p.147). When the foster care supervisor for DSS, Rebecca Jorgensen ("Jorgensen"), arrived, Respondent was standing on the porch smoking a cigarette. (App.p.140). Respondent claimed Victim had been acting normally then started shaking and fell to the floor. (App.pp.141–42). He showed Jorgensen the sofa and said, "Look, that's where [Victim] peed, and she peed on me." (App.p.141). Respondent also stated that when Victim started shaking and fell to the floor, "he picked [Victim] up and took her to the kitchen, and put her on the table in the kitchen to do CPR." (App.p.141). He demonstrated picking the child up and carrying her into the kitchen as he talked. (App.pp.141–42). Jorgensen observed stains on the sofa, two pairs

of girls' underwear on the floor in the living room, a hammer on the floor next to the bed where Sister slept, and a cigarette butt in the bathroom sink. (App.p.142). Jorgensen and a co-worker woke Son and Sister and removed them from the home. (App.p.143).

Autopsy Findings

An autopsy was conducted on October 8, 2011, by Dr. Cynthia Schandl ("Dr. Schandl"). (App.p.93). Dr. Schandl began with an external examination, noting numerous injuries consistent with abuse. (App.p.119; App.p.124). She noted Victim's head was shaven. (App.p.105). Dr. Schandl also detailed extensive external injuries – numerous bruises (seven or eight to Victim's face and head, several to the inner thighs, and on her vagina), round ulcerations which appeared to be burns in various stages of healing, and subdural hemorrhage indicating trauma to the head. (App.pp.98–99; App.pp.105-06). Victim had obvious bruises to the left and right sides of her head, her face, her chin, her neck, and "the angle of her mandible." (App.p.105; App.pp.120–21). The bruises to her head went into the scalp. (App.p.105). There were hemorrhages around the optic nerves, further suggesting significant trauma to the head. (App.p.106). The bruises about the head suggested blunt trauma. (App.p.107). Dr. Schandl was very suspicious of abuse based on the head injuries. (App.p.108).

Victim suffered several other injuries. Notably, hemorrhaging inside Victim's vagina indicated a blunt trauma within two to three days of her death, an injury suspicious for some sort of sexual assault. (App.pp.111–12). There were other more superficial bruises on the child's body. There was a long, narrow bruise on Victim's abdomen, and there were two bruises on her inner thighs. (App.pp.106–07; App.pp.122-23). There were scrapes and bruising further down her legs, particularly around the ankles. (App.p.107).

There were at least five burn marks on Victim's body. (App.p.109). Dr. Schandl described five places on the Victim's buttocks where "the skin is basically, simply absent." (App.p.109; App.p.123). Those burns occurred within forty-eight hours of death. (App.p.112). The injuries were consistent in size with a cigarette burn. (App.p.109). Dr. Schandl noted several other similar round areas that had healed and scarred. (App.p.109). There were two healing areas in Victim's vaginal area very consistent with the fresher burn injuries to her buttocks. (App.pp.109–10; App.p.123).

The extensive injuries did not cause Victim's death, however. Victim was found to have suffered a "massive infection that started as a urinary tract infection." (App.p.96). The infection spread to Victim's bladder and kidneys. (App.p.96). From there, it became a blood infection. (App.pp.96–97). The blood infection affected the way the blood clotted. (App.p.97). Victim began having blood clots which "went to her brain, and she had basically small strokes in her brain from those clots caused by the infection." (App.p.97). The blood clots would cause small areas of the brain to die.[2] (App.p.100). Dr. Schandl found evidence that Victim was suffering brain damage during the 5-7 days before her demise. (App.p.100).

Dr. Schandl opined Victim would have first displayed symptoms of the urinary tract infection (UTI) – burning with urination, frequent urge to urinate, leakage, and bloody or foul-smelling urine. (App.p.101). As the infection progressed to her kidneys, in addition to the symptoms of the UTI, she would have experienced back pain. (App.p.105; App.p.132). As the infection progressed, Victim would have suffered the effects of extremely high fever. (App.p.101). As the blood infection raged, brain damage could cause symptoms such as tiredness, not wanting to eat, difficulty waking, coma, and seizures during Victim's final days.

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[2] While extensive bruising could also cause blood clots, Dr. Schandl believed the infection "was enough to kill her." (App.p.132).

(App.pp.100–01). During the final week of her life, Victim would have been wobbly, lethargic, slow, and non-reactive when people spoke to her. (App.p.102; App.p.127). It would have been obvious that the child was very sick. (App.pp.102–03).

Agent LaRosa's Testimony

SLED Agent Paul LaRosa, was proffered and qualified as an expert in crime scene reconstruction and crime scene analysis, the latter commonly known a criminal profiler.[3] LaRosa has been qualified to testify as an expert in crime scene and crime scene reconstruction approximately thirty or forty times. (App.p.429; App.p.437; App.p.470). He testified in General Sessions court as an expert on crime analysis or criminal profiling in one murder case approximately six months before Respondent's trial. (App.p.437; App.p.470). He has also testified in Federal Court "on the dangerousness of an individual, as an expert of threat assessment and recognition of management." (App.pp.437–38; App.p.468). Respondent's case was the first case in which he was qualified as an expert involving sexual misconduct. (App.p.452).

With regard to his role as a criminal behaviorist, LaRosa explained his role as looking at evidence left behind at a crime scene and using that evidence to "look at what type of offender would commit that crime." (App.p.432). The traditional role of behaviorists involves assisting law enforcement when they are trying to figure out who committed a crime—answering the question, "what kind of a [person] would have done this?" (App.p.475). The profiler then reviews the facts of the case and combines that information with statistical research to come up with "a general idea of who we're looking for." (App. p 475). LaRosa stated his analysis is based upon research of "thousands and thousands of violent offenders," and databases containing

[3] LaRosa's qualification as a crime scene analyst is also variously referred to during trial as criminal profiler or criminal behaviorist. LaRosa testified "you can be a crime scene reconstructionist and not be a criminal profiler, or a crime analyst, or crime analytic, but you can't be a profiler without being a reconstructionist." (App.p.469).

case studies of past behaviors to predict future behaviors. (App.p.434; App.pp.444–45). He also explained that profilers or analysts are often contacted by law enforcement for assistance in how to question a suspect. (App.p.430; App.pp.475–76).

While criminal behaviorists are not a psychologists or psychiatrists themselves, they are "good seasoned police officers" trained "in a little bit of psychiatry" and working with psychiatrists to investigate crimes. (App.pp.442–43; App.p.476). He consults with others in the profession, both other behaviorists and psychiatrists or psychologists. (App.p.434; App.pp.476–77). LaRosa is one of three qualified criminal profilers or analysts in South Carolina, and he also consults with analysts at the FBI. (App.p.443).

Agent LaRosa explained profiling is subject to a peer review system. (App.p.442; App.pp.442–43). He has other analysts review his conclusions. In this case, after reviewing a basic investigative packet, LaRosa contacted other profilers and a forensic psychiatrist to seek out other cases with similar circumstances. (App.pp.438–39; App.pp.442–43; App.pp.476–77.)

Based on the information provided, including: (1) autopsy results; (2) crime scene photographs; and (3) medical records, LaRosa opined that the perpetrator in Victim's case was likely a male due to the injury to the Victim's vaginal area as the injury would tend to indicate a sexual arousal element. (App.pp.433–34; App.pp.481–82). LaRosa stated that in his review, 90%-99% of child sexual assaults were perpetrated by men, and there were no cases he could find similar to Victim's where the sole perpetrator was female. (App.pp.481–82). He believed the injuries to Victim were most consistent with someone with private access to the Victim over a period of time. He noted this conclusion was based on the fact that the burns were in various stages of healing. (App.pp.482–83).

Further looking at the burns, based on a review of prior cases, he noted that children often move when touched with something hot. (App.p.440; App.p.480). In LaRosa's view, burns perpetrated by other children are often "flashing burns" because the victim moves away from the burning object. However, the burns in Victim's case were "direct and specific" which indicated that Victim was unable to move from the burning. It was therefore likely that someone older and stronger than Victim burned her. (App.p.441; App.pp.479–80). He noted the common sense inherent in his statements regarding the burns:

> *It's not a profiler thing*. But a three year old that runs into a hot object is going to move, and they're going to wiggle free. There was no wiggling. So the person who was doing this would have control over her where she could not move as the burns were being inflicted to her vagina.

(App.pp.480–81) [Emphasis supplied]. LaRosa stated his analysis in this case was reviewed by others in the field. (App.p.444).

LaRosa was clear that he could not determine whether Respondent inflicted the wounds to the child. (App.p.440; App.p.484). He can only say that "it would've been somebody, a male, who would have had direct influence over this child. Would have the ability to be alone over a period of time, to inflict over a period of time these --- these burns and this abuse to this three year old's vagina." (App.p.448).

The trial court, exercising its gatekeeper role to determine found his testimony would assist the finder of fact and that LaRosa was qualified by his knowledge, skill, experience, and training.[4] The trial court also made a finding that the underlying science in his fields reliable.

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[4] It is interesting that Respondent objected, in part, to LaRosa's testimony on the basis that it was within the purview of laymen, stating the "jury can draw their own conclusions from that without expert testimony." (App.p.454). However, he now also argues that LaRosa's qualifications were not adequate to render such testimony.

Applying State v Council,[5] 335 S.C. 1, 515 S.E.2d 508 (2003), the trial judge found Agent LaRosa's procedures were recognized, his work is peer reviewed, and that his methodology is recognized and consistent with methods used throughout the country among criminal behaviorists, also called profilers. (App.pp.457–58). The trial court qualified LaRosa to "give some analysis of the crime scene, which actually is the body of the child."[6] (App.p.458). However, the trial judge made it clear Agent LaRosa could not provide information "finger[ing] [Respondent] as the culprit," including statements explaining Respondent was the only male with access to the child because such information would be an inappropriate factual determination.

Respecting the trial judge's ruling, Agent LaRosa testified only to the information explained above.

Respondent's Statements and Testimony

Respondent conceded several times that if he was guilty of anything it was not getting medical attention for Victim. (App.p.195; App.p.252; App.p.266; App.p.571; App.p.760; App.p.805; App.p.821; App.pp.823–24; App.p.872[7]).

When asked about the burn marks on Victim's vagina, Respondent said Hunt told him Victim "just blistered up." (App.p.192; App.p.201; App.p.238). In response to questioning about the marks on Victim's legs, Respondent reported Victim fell in the bathroom once and on

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[5] Pursuant to Council, the trial court must consider the following concerning expert testimony for scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517.

However, this Court has found these factors fail to serve a useful analytical purpose for non-scientific evidence such as Agent LaRosa's testimony. State v.White, 382 S.C.265, 274, 676 S.E.2d 684, 688 (2009). The Court has declined to offer specific factors for non-scientific expert evidence and simply requires that the trial court exercise its role as gatekeeper and determines if the proffered evidence is reliable. Id.

[6] LaRosa was not permitted to say that Respondent was the only person with access to the child, and LaRosa was not permitted to discuss his analysis of Hunt's diary entries. (App.p.460).

[7] Ct. Ex. 2 (App.pp.721–924) is a transcript of a videotaped statement which was played for the jury as State's Exhibits 81, 82, and 83.

another occasion he popped Victim because she was about to touch a wall socket. (App.p.193; App.p.534.)

Respondent was also asked about caring for the child. He claimed he bathed Victim, but Sister would wash Victim's bottom area. (App.p.196). He discussed having issues potty training her. (App.pp.197–98).

Respondent testified that Victim sustained two accidental injuries on October 3. Victim ran into one of his cigarettes and burned her arm. (App.p.538). She also slipped and fell in the bathroom. (App.p.539).

Respondent also stated he feared DSS would become involved, and he did not want to lose his son Alex. (App.p.205; App.p.267; App.p.570; App.p.573; App.p.835). Contrary to his asserted fear of DSS, he also defended his failure to notify authorities about Victim's condition, stating, "DSS done been called before and they ain't did nothing. I mean, what's the point." (App.p.574).

Respondent testified that the night Victim died, Hunt came home and told him Victim was having "one of her little episode. Little episode is when she's got her fist clenched up . . . [Hunt] come got me and showed [Respondent] [Victim] was having a little episode, and it lasted like three minutes and she went back to normal." (App.pp.548–49). Victim was warm, so they put her in front of the air conditioner. Respondent laid down in the same room while Hunt went to make dinner. He heard a grunting noise but wasn't sure if it was Victim or the dog. (App.pp.549–50). Hunt came back in the room. Respondent touched Victim's stomach and she made the grunting noise. She felt cold so they ran warm water in the bath. (App.pp.551–52). He put her in the bath, stating "it ain't my child. If the parent tell me how to do something, I did it." (App.p. 553). He then wrapped her in a burgundy towel and sat her on the love seat while Hunt

collected clothes for Victim. At that point, Victim made a "squealing noise" and rolled off the love seat and onto the floor. Victim was not breathing, and Respondent carried her to the kitchen table to attempt CPR. (App.p.554). He later put Victim in the back seat of the car when Hunt and Denea Malachi left for the hospital. (App.p.555).

ARGUMENT

I.

The Court of Appeals erred in finding testimony of SLED Agent Paul LaRosa, qualified as an expert in crime scene reconstruction and crime scene analysis, inadmissible under Rule 403, SCRE as statements suggesting guilt on an improper basis. The court failed to apply a deferential abuse of discretion standard when reviewing the trial judge's ruling on the admissibility of the testimony and misapprehended the scope and context of the statements as wells as standing South Carolina law allowing the use of criminal profiling evidence in at least some situations.

Abuse of Discretion Standard of Review

The State notes the Court of Appeals failed to apply a deferential abuse of discretion standard when reviewing the trial judge's ruling on the admissibility of Agent LaRosa's testimony. The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

In the instant case, the court failed to give deference to the trial judge's ruling. Instead, it performed its own analysis of the probative value of Agent LaRosa's testimony. This Court has been emphatic in awarding a trial judge great deference in Rule 403 analyses. See State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (2008). The Court has specifically stated "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court

believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence," and cautioned that "[i]f judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 339, 665 S.E.2d at 207.

In its opinion, the Court of Appeals cites to the trial judge's Rule 403 analysis for its proposition that Agent LaRosa's testimony was a criminal profile submitted for the purpose of demonstrating Respondent possessed the characteristics of a "typical offender" and as such possessed no probative value. However, the court failed to recognize this analysis was performed on Agent LaRosa's proffered testimony, and based on this same analysis the trial judge limited his statements to those he deemed relevant to the determination of Respondent's guilt. The trial judge imposed several limitations on Agent LaRosa's testimony, namely: (1) he could not testify that Respondent was the only male with the degree of access required to inflict the injuries; and (2) he could only testify about his analysis of the victim's wounds and the infliction of the wounds, and to go beyond that would exceed his "area of expertise" and unfairly prejudice Respondent. (App.pp.460–61). These limitations were critical aspects of the trial judge's ruling designed to exclude non-probative evidence from the jury. Accordingly, the court erred in failing to consider this in its analysis.

Moreover, the court's opinion indicates it determined the "danger of unfair prejudice outweighed any possible probative value" instead of determining whether the danger of unfair prejudice substantially outweighed the possible probative value of Agent LaRosa's statements as required by Rule 403. In State v. Collins, 409 S.C. 524 763 S.E.2d 22 (2014), this Court found the court of appeals erred in overturning a trial judge's Rule 403 analysis regarding the admission of the victim's pre-autopsy photographs depicting his "gruesome" injuries inflicted by

the defendant's dogs. Noting that appellate review of a trial judge's Rule 403 analysis is a "highly deferential standard of review," the Court found the Court of Appeals' analysis improper because: (1) the court determined the evidence was prejudicial, rather than evaluating whether the danger of unfair prejudice substantially outweighed the probative value of the evidence; and (2) there were no witnesses to the crime, and therefore the pre-autopsy photographs were necessary in determining the defendant's guilt of the charged offenses. Here, similar to Collins, the court failed to determine whether the danger of prejudice from Agent LaRosa's testimony **substantially** outweighed its probative value.

Accordingly, the Court of Appeals erred in failing to consider whether the unfair prejudice of admitting Agent LaRosa's testimony substantially outweighed its probative value and in ignoring the deferential abuse of discretion standard applied by our appellate courts.

Admissibility of Criminal Profiling Evidence in South Carolina

On the merits, the court misapprehended the scope and purpose of Agent LaRosa's testimony. In reaching its ruling, the court concluded: (1) criminal profiling constitutes propensity evidence and never possesses any probative value; (2) other jurisdictions have condemned criminal profiling evidence as propensity evidence; (3) this Court "indirectly addressed" profiling evidence in Underwood v. State, 309 S.C. 560, 563–64, 425 S.E.2d 20, 22–23 (1992), in which it found a defendant's trial counsel was not ineffective for failing to object to this testimony because it was not offered to identify the defendant as the offender; and (4) Underwood is distinguishable from the instant case because LaRosa's testimony "could lead a reasonable juror to no other inference than" Respondent inflicted the burns on Victim and therefore had a propensity to commit the sexual battery resulting in her death, a fact reflected in the trial judge's Rule 403 analysis.

The State notes the court failed to consider standing South Carolina law when it found "criminal profiling . . . has no place in a trial to determine the guilt of a specific individual." This Court has recognized the propriety of such evidence in some situations. In Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992), the Court found trial counsel was not ineffective in failing to object to an expert witness's testimony about the "common profile" of people who sexually abuse children. The witness testified:

> A person who wants to have sex with or to accomplish penile-vagina penetration with a child may be one of two kinds of people. **He** may be a person who is so wound up in **his** own needs or so angry that **he** doesn't care how much it hurts the child at all. In that case, you can have a very violent rape. You can have significant damage to the child which requires a surgical repair.
>
> That is not - that is - a lot of people feel that that's the common kind of sexual abuse of children. That's not true.
>
> Very prominently, people who want to become sexually involved with children are people who want and need the children to like them, to trust them, and to come back for more.
>
> If you hurt a child very badly, that child is going-another adult is going to find out more likely. The child isn't going to come back, and you will be discovered. Therefore, many people who want to be sexually involved with children are careful of the children with whom they become sexually involved.

Id. at 563, 425 S.E.2d at 22 (emphasis added).

The Court noted the witness "was testifying as to the common behavior of sexual abusers of children and how this behavior might manifest itself in the physical injuries of children" to explain why she found only a small tear in the hymen of one of the victims and such a small tear is compatible with partial penial penetration and "consistent with sexual abuse." Id. The Court also noted such testimony was analogous to "battered or shaken child syndrome" prosecutions, as such cases involve testimony based upon "physical findings to support an inference that a

child's injuries were not accidental" and emphasized the witness "did not offer the testimony to set out personality or character traits which [the defendant] possessed in order to identify him as the offender." Id. at 563–64, 425 S.E.2d at 22–23.

In State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999), this Court found a trial judge erred in failing to grant defendant's motion for a new trial based on after-discovered evidence. Around the time of the victim's death, two other murders had taken place involving victims of similar age and build killed in similar manners. Id. at 620–21, 513 S.E.2d at 99–100. Defendant learned about these other murders and their similarities after his trial, and sought to introduce evidence that the three murders were all perpetrated by the same person and such person could not have been him because the third murder occurred after he was in police custody. Id. At the motion hearing, the defendant presented the testimony of three expert witnesses, including one qualified in "crime scene analysis and criminal personality profiling." The expert witness "profiled the killer of these three women as a white male in his mid-20's to mid-30's, with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of childhood abuse, and knowledge of the area." Notably, the defendant did not fit that profile. Id. The trial judge denied the motion, finding that information about the murders was available to the public at the time of trial. The Court found the trial judge erred in failing to grant the new trial, noting the three experts, particularly the criminal profiler, provided testimony tending to exonerate that could not have been discovered by his attorneys because the similarities between the crimes were not apparent at the time of trial. Id. at 621–22, 513 S.E.2d at 100.

These two cases demonstrate South Carolina courts generally allow criminal profiling testimony to be used as evidence in a criminal trial. In Spann, the more recent of the two

decisions, the Court embraced the use of broad criminal profiling testimony and found it, along with testimonies from a forensic pathologist and forensic psychiatrist, justified granting the defendant a new trial. Notably, the profiling testimony focused on the characteristics of the alleged perpetrator, noting the killer was likely a "white male in his mid-20's to mid-30's," similar to Agent LaRosa's profile of the attacker, whom he believed was likely a male between the ages of twenty-five and forty. See id. at 621, 513 S.E.2d at 100.

In Underwood, similar to the instant case, the expert avoided broad personality characteristic comparisons between the defendant and "typical" abusers of children. Instead, both the Underwood expert and Agent LaRosa used the physical evidence found on the bodies of the victims to craft their profiles. Moreover, Agent LaRosa's testimony was more restrained than the Underwood expert's: Agent LaRosa testified the person who assaulted Victim was **likely** male because an overwhelming percentage of sexual assaults are committed by men but admitted it was possible a female committed the crimes, whereas the Underwood expert omitted such cautionary language from her testimony and used male pronouns when describing her profile.

With the exception of Underwood, the Court of Appeals cites to cases from other jurisdictions[8] where the ruling courts noted criminal profiles were used for the sole purpose of showing the defendants fit the profile of a typical offender of such crime. At best, those cases are merely persuasive authority from outside this jurisdiction. More importantly, however, those cases are wholly distinguishable from the instant case because they involved experts providing general criminal profiles unrelated to the actual evidence of the defendants' guilt. A prime example of this is the court's reliance on Sanders v. State, 303 S.E.2d 13 (GA. 1983), in which

[8] In its opinion, the court cites to United States v. Jones, 913 F.2d 174 (4th Cir. 1990); State v. Clements, 770 P.2d 447 (Kan. 1989); Commonwealth v. Day, 569 N.E.2d 397 (Mass. 1991). All three cases involve expert witnesses who provide criminal profiling testimony of the "types" of individuals whom generally commit the crimes charged.

the Supreme Court of Georgia condemned criminal profiling testimony. The expert in Sanders was a clinical psychologist with no background in crime scene analysis. Id. at 16. Further, he implicated the defendant's character by describing a profile of typical battering parents and openly compared the defendant's personality characteristics to that profile. Id. at 18. The court held that unless a defendant has placed her character in issue or has raised a defense involving battering parent syndrome, the prosecution could not introduce evidence of the syndrome or a defendant's personality traits "**as its foundation for demonstrating the defendant has the characteristics of a typical battering parent**." Id.

Agent LaRosa did not present a profile of the "typical" person who would abuse a child; quite the reverse, his profile described the specific person who committed the crimes and was founded upon his analysis of Victim's injuries. Notably, LaRosa testified before the jury that his deductions were based on his "crime reconstruction" experience, the photographs of Victim's body, and the autopsy report. (App.pp.479–80).

In its opinion, the court claims the State presented the profiling evidence to answer the question, "How could anyone do this to a child?" and the only practical reason for the State to present the answer to said question would be "to suggest that Respondent fit the profile of a person who would inflict this type of abuse" and, accordingly, must have been the person who committed the crimes against Victim. However, the court ignores the numerous statements on the record which indicate the State did not submit this evidence to suggest Respondent fit the profile of a member of some class of people who **would** inflict this type of abuse, but rather Respondent matched the physical characteristics of the specific individual who **committed** this abuse.

Accordingly, the Court of Appeals erred in finding the trial judge erred in admitting Agent LaRosa's testimony. Agent LaRosa's testimony was based on the physical evidence in the case and highly probative of Respondent's guilt.

II.

The Court of Appeals failed to consistently apply its harmless error analysis, finding Agent LaRosa's expert testimony was harmless error in Respondent's unlawful conduct toward a child conviction, but not his Homicide by Child Abuse charge, where the evidence cited by the court to support the former charge, along with additional evidence in the record, also supported finding any alleged error in allowing Agent LaRosa's testimony harmless as to the second charge.

The State also asserts the court failed to consistently apply its harmless error analysis to Respondent's HCA conviction. Section 16-3-85(A) of the South Carolina Code (2015) states a person is guilty of homicide by child abuse if said person:

> (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or
>
> (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(emphasis added). Section 16-3-85(B)(1) defines child abuse or neglect as "an act or omission by an person which causes harm to the child's physical health or welfare."

In its opinion, the court found admission of Agent LaRosa's testimony was harmless error in Respondent's unlawful conduct toward a child conviction because: (1) Dr. Schandl explained Victim's deteriorating health would have been patently obvious to Respondent; (2) Respondent admitted on direct examination he should have done something to help victim and in his testimony admitted he did not know Victim was as sick as she was, which "necessarily implied" he knew Victim was sick to some extent; and (3) Respondent admitted he was afraid

DSS would take his son away if he sought medical help for Victim. Thus, the court concluded the overwhelming evidence indicated he placed victim at unreasonable risk of harm pursuant to Section 63-5-70(A).

The Court of Appeals failed to apply this same reasoning to Respondent's HCA conviction, as this same evidence shows Respondent was guilty of neglect amounting to an extreme indifference towards Victim's life. Respondent failed to obtain medical attention for Victim despite witnessing Victim's rapidly deteriorating health. In addition to the testimony cited by the court, Respondent admitted during trial and during his police interviews he was "guilty of neglect" and to witnessing Victim's seizures—what he referred to as "little episodes"—leading up to Victim's death. (App.p.246; App.p.257).

Notably, he claimed one of Victim's seizures was so extreme he had to grab her mouth to prevent her from "swallow[ing] her tongue." (App.pp.534–35). Moreover, he admitted: (1) he witnessed at least one of the seizures the day of her death and shortly thereafter heard Victim making "grunting" noises; and (2) he dissuaded Hunt from seeking medical care for Victim by telling her a doctor would call DSS and inform the agency of the "marks" on Victim. (App.pp.548–52; App.pp.572–73; App.p.575). Dr. Schandl testified these seizures, and other ailments Respondent described witnessing including lethargy, loss of appetite, and difficulty walking were symptomatic of the infection that ultimately killed Victim. (App.pp.101–02; App.pp.256–57). Despite this plenitude of observed maladies, Respondent never sought medical care for Victim.

Accordingly, the Court of Appeals erred in failing to find any perceived error in admitting Agent LaRosa's testimony was harmless as to Respondents HCA conviction.

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should grant the petition for a writ of certiorari. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

Respectfully submitted,

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May 22, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM MARLBORO COUNTY
Court of General Sessions
Honorable J. Michael Baxley, Circuit Court Judge

Opinion No. 5473 (S.C. Ct. App. Filed March 15, 2017)
Appellate Case No. 2013-001409

THE STATE, ... PETITIONER,

v.

ALEXANDER CARMICHAEL HUCKABEE, III, ...RESPONDENT.

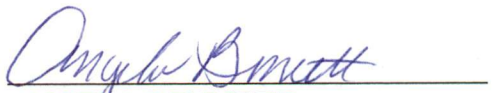
PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by sending two copies of the same to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

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

This 22nd day of May, 2017.



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