STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC Court of Appeals

Certiorari to Marlboro County

Honorable J. Michael Baxley, Circuit Court Judge

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

12-GS-34-00037-38, 135 & 627

THE STATE,

PETITIONER,

V.

ALEXANDER CARMICHAEL HUCKABEE, III,

RESPONDENT.

APPELLATE CASE NO 2017-001213

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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The Court of Appeals correctly held the trial judge erred by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the probative value of the expert "offender behavior" evidence, offered as definitive proof of Respondent's guilt, was substantially outweighed by the danger of unfair prejudice as LaRosa's testimony was not probative of whether the Respondent committed the specific acts for which he was standing trial and provided no information helpful to the jury's understanding of the evidence properly before it.

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The Court of Appeals correctly applied its harmless error analysis when concluding that Agent LaRosa's testimony could not have been harmless error with respect to Respondent's conviction for homicide by child abuse.

STATEMENT OF THE CASE

On October 6, 2011, Respondent and his girlfriend, Atelia Hunt, took Hunt's minor child to the emergency room after she suffered a series of seizures. App. 68, ll. 22-23. Minor child was not breathing. *Id.* Tragically, attempts to revive her were unsuccessful. App. 70, ll. 1-21. Linda Hooper, the supervising nurse on duty that night, noticed that minor child had multiple bruises and burn marks. App. 70, ll. 22 – App. 71, ll. 3. Hooper also noticed that the minor child's head was shaved. App. 68, ll. 17-23.

An autopsy revealed that the minor child died from an untreated urinary tract infection which eventually spread to her kidneys causing a blood infection. App. 92, ll. 5 – App. 93, ll. 22. The bacteria in her blood caused irregular clotting; progressing to a series of small strokes when the infected blood clots reached her brain. *Id.* Dr.p. Cynthia Schandl, who performed the autopsy, believed that the symptoms from the infection, particularly as it progressed to the brain would have been noticeable, such as: unsteady walking, lethargy, loss of appetite, and possibly seizures. App. 96, ll. 18 – App. 97, ll. 11.

Proffer Testimony of "Criminal Profiler" Paul LaRosa

At trial, the State sought to have Lieutenant Paul LaRosa of SLED to testify as an expert in in "offender behavior" or "criminal profiling." App. 443, ll. 10-11. A proffer was held to determine whether the "science" of criminal profiling was sufficiently reliable and whether LaRosa had the necessary qualifications. *Id.* at 18-23.[1]

LaRosa had worked at SLED for eighteen years. He had a bachelor's degree in art and political science. App. 534, ll. 24 – App. 538, ll. 5. He began his career in the Latent Print Crime Scene Unit and was certified in crime scene reconstruction. App. 424, ll. 3-12. From 2000 to 2005,

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[1] Criminal profiling is also referred to as "victimology"; "behavioral analysis"; and "criminal behavioralist." App. 426, ll. 8-10; App. 439, ll. 11-20; App. 471, ll. 14-15.

he was a member of the Blood Hound Tracking Team, followed by a period as an investigatoApp. *Id.* at 12-19. In 2010, he entered an understudy program to become a criminal profileApp. *Id.* at 20-23.

During this program his mentor was Mike Prodan, the subject of the opinion in *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); App. 426, ll. 5-10. It is unclear if LaRosa was still an understudy at the time of this investigation. *Id.* at 11-16.

LaRosa's formal instruction on criminal profiling and psychology, specifically sex offense profiling, came from two programs: (1) an eight week FBI course and (2) a one month internship with the Department of Mental Health. App. 426, ll. 19 – App. 428, ll. 1. LaRosa claimed his usual role is to help police identify the characteristics of a potential offender before the police have arrested or identified a suspect. App. 426, ll. 19-22.

LaRosa admitted Respondent's trial was the first time he testified as an expert criminal profiler in any court regarding sex offender profiles, but added optimistically, "we've got hundreds in the chute ready to go." App. 447, ll. 6-13. LaRosa further admitted that Respondent's case was only his second time testifying as a criminal profiler in any court. App. 434, ll. 7-9.

On the scientific reliability of "criminal profiling" and its methods, LaRosa claimed repeatedly that his work was peer reviewed. App. 330, ll. 15-18; App. 439, ll. 6-7; App. 439, ll. 25 – App. 440, ll.7; App. 440, ll. 6-7; App. 444, ll. 9-13; App. 472, ll. 23-25. He never identified or elaborated on what peer in the field of "criminal profiling" reviewed his work on this case, but simply that he had sent his results to others and they had approved of his profile. App. 439, ll. 2-7.

No other criminal profilers, psychiatrists, or psychologists were called by the State to verify the accuracy of LaRosa's profile. LaRosa averred:

> Within our field, because we have the access of others that we bounce things off of. We talk. We have case reviews and that kind

> of stuff. We do have some fellow behavioral investigators with the FBI. There are several in Virginia that we will share with each other this information, and make sure that we're tracking correctly. But this case was peer reviewed in the --- in the testimony that I was going to testify to, about it being a Situational Child Molester with sadist overtones. And we know that a Situational Child Molester is going to be a male, and that he gets sexual gratification from inflicting pain on others.

App. 439, ll. 18 – App. 440, ll. 5. LaRosa explained that his conclusions on the sexual nature of the abuse as well as the gender, age, and relationship of the victim to the perpetrator were drawn in part on an FBI criminal profile database. App. 435, ll. 13-21.

He did not name this database. LaRosa never referenced any scientific, psychological, or psychiatric treatises relied on when designing his criminal profile, and he did not reference any authorities in the criminal profiling field whose generally reliable or accepted methods he followed.

With respect to the amount of information about the case he used, LaRosa claimed he examined the autopsy report, and was told the "bases of the case," including the background of the Respondent and co-defendant by Bass. App. 429, ll. 16-21; App. 432, ll.16-19. LaRosa stated that he concluded the offender behavior fit the profile situational child molester:

> The accuracy rate. **We have learned from our past mistakes as Criminal Profilers and Behaviorists, in a case like this we're not specifically saying that Mikey is the one who inflicted those ---** those scars and the sexual abuse on this victim. I can not say that he did it. **I can just say that it would've been somebody, a male, who would have had direct influence over this child. We 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 who would have had direct influence over this child.

App. 444, ll. 14-23 (***emphasis added***).

Interestingly, LaRosa admitted that **the description of the possible offender was intentionally vague so as to improve the accuracy of his profile.** App. 445, ll. 5-7. LaRosa

confessed that, "in the past [criminal profilers] would say that it would be a white male, twenty-four years old, driving a red truck, [or] he was twenty six years old driving a green truck, so we've pattern this a little different," in an effort to increase the chances that the person charged with the crime matches the criminal profile. App. 444, ll. 25 – App. 445, ll. 4.

LaRosa did not submit his findings in a written report and the content of his testimony was not revealed to defense counsel until the day before he was to testify. LaRosa only became involved in the case after Respondent and co-defendant were arrested. LaRosa had no investigative function helping law enforcement generate leads or narrow down a large group of suspects. App. 429, ll. 16-21.

Trial Court's Ruling on Admissibility of LaRosa's Testimony

The trial court qualified LaRosa as an expert in the science of criminal profiling and ruled that all aspects of his testimony was admissible. App. 453, ll. 5-18. The trial court stated its opinion that the requirements for reliability were met:

> I find that, you know, **there are numerous publications. There is peer review** of this technic [sic] which he testified to yesterday. He also testified that he has **previously been admitted as an expert in crime scene analysis, and also other behavior issues.** He's never--- he candidly admitted he has not been admitted as an expert in a CSC case allegedly with this type of evidence. But the Court does not find that the fact that this would be first impression on this specific set of facts would disqualify him to testify today.
>
> I do find that because there is, he has an opportunity to work with the colleagues. He has worked with the behavioral group with the FBI, that thus there is --- there are quality control procedures, and there also are consistency --- are consistency in the methods that he applies.

App. 453, ll. 9-24 (*emphasis added*). The trial court also concluded that criminal profiling was a sufficiently reliable scientific field to be admitted as evidence at trial:

> Basically, looking at this from **some sort of *Dauber[t]* Analysis** as well, that I find that this area of law is a cross roads of psychology, and human behavior, and crime scene analysis. As I said earlier, it is peer reviewed.

App. 453, ll. 25 – App. 454, ll. 3 (*emphasis added*).

Curiously, the trial judge buttressed his finding, by noting criminal profiling's alleged general acceptance in popular culture somehow confirmed the scientific reliability of LaRosa's expert testimony and made it proper for the jury to hear:

> The Court finds that there is **general acceptance now for this type of testimony, not only in the public domain, who may have even come to expect from television shows such as Criminal Minds and other media** that involve this type of science that has a definite impact on jury expectations. Although we're not here necessarily to play to jury expectations, **it just tells me that this is a generally accepted area of science. And I was impressed yesterday that Agent LaRosa testified that, because he will not identify the [Respondent] as the perpetrator, he has at least his position was, he would have a zero rate of erroApp. But the Court has some comfort that he's not here today to necessarily target by name a specific defendant,** he is simply is going to give some annualizes [verbatim] of the crime scene, which actually is the body of the child.

App. 454, ll. 9 – App. 455, ll.20 (*emphasis added*).

The trial court then determined that the probative value of LaRosa's testimony substantially outweighed any prejudice. App. 453, ll. 21 – App. 454, ll. 7. Specifically the trial court found that:

> [t]he jury here is confronted with basic questions. **How could anyone do this to a child?** Clearly if these wounds are not self-inflicted, these are cigarette burns, and that is the, I guess, the real evidence here, is **the State's attempt to prove that the Defendant did it. That's what brings us here. But the jury has to be wondering how could such a thing occuApp.**
>
> And the Court finds that this is a core concern. It's really something we haven't discussed yet. **I'm sure it will come out in closing about how anyone could do this. How could this type of crime be committed?** Clearly the crime was committed here. I'm not saying

> that the Defendant did it, **but someone did**, because again these wounds cannot self-inflicted.
>
> And so, the Court finds that **this type of behavioral analysis to assist the jury in bringing an understanding to what really is a core issue,** so I find it highly probative.

App. 455, ll. 8-24 (*emphasis added*).

The trial court reasoned that the testimony was not prejudicial because the defense should have prepared for the State to put up evidence that Respondent committed the crime. App. 456, ll. 1-4. The trial court did caution that if the testimony "***attempts to exclude the other adult in the house, which of course, is the mother***....when he attempts to exculpate her, the court believes that goes beyond what would be expected in the case by defense counsel." App. 456, ll. 10-16 (*emphasis added*).

LaRosa's Trial Testimony Before the Jury

Immediately upon being qualified as an expert witness and having his reliability sanctioned by the trial judge, LaRosa summarized what "criminal profilers" do in a typical investigation. App. 471, ll. 7 – App. 474, ll. 6. LaRosa asserted, "**it's what televisions show, shows the majority of the time, is you have a victim and we don't know who did it....** We get into all kinds of victimology. Who was the victim. What was she like..." App. 471, ll. 10-16 (*emphasis added*). He testified that the majority of the work concerns looking at how the crime was done, **the victim's lifestyle** (minor child was four at the time of her death), and the background and lifestyle of the potential suspects. App. 471, ll. 17 – App. 472, ll. 11.

LaRosa stressed that criminal profiling is a collaborative effort and that he "consulted with other 'criminal profilers' and make sure that everything that I'm seeing in a peer review system...are correct." App. 472, ll.21 –App. 473, ll. 10. In concluding what a "criminal profiler" does, LaRosa concluded, "we were asked why would somebody do this. What are the most likely

characteristic of a person that would do this and harm this child this way." App. 473, ll. 23 – App. 474, ll. 1.

His methods and goals explained, LaRosa then recounted his role in Respondent's case. App. 474, ll. 11 – App. 479, ll. 12. LaRosa stated that he drew on his crime reconstruction background in addition to his profiling expertise in determining the perpetrator was an adult male because he believed the burns on the minor child demonstrated that she was held down while they were inflicted. App. 476, ll. 4-24.

LaRosa proffered that since the burns were inflicted around her genital area and that ninety-nine percent of all violent sexual assaults on children are done by males; the perpetrator was a male. App. 477, ll.7-2. LaRosa assuaged any skeptical jurors, professing:

> [I]t is right there in my research, and the research was done as late as this past week, and it was doubled checked last night. ***There were no cases*** that I could find from ***the Forensic Psychiatrist that I consulted*** with and also ***the other Profilers in our unit***, where we have ran into a case where a sole offender would be a female.

App. 477, ll. 21-25 (*emphasis added*). None of the individuals alluded to by LaRosa testified at trial or were identified by name.

Having asserted his infallibility and outlined his methodology, LaRosa revealed the criminal profile he constructed, prefaced with explicit assurance that the fact Respondent was already in custody had no impact on his conclusion:

> If this case came to us as a traditional profile and we had this victim on the side, say on the side of the road, ***we didn't know who she belonged to or what the history was***. I would be telling the local authorities that ***you would be looking for an adult male, approximately the age of twenty five to forty***, who would have --- who would --- once we would identify her and know who she is, ***that this individual would have direct access over this child where they were able to have complete control over a period of time.***

App. 478, ll. 9-18. On cross-examination, LaRosa conceded that Respondent's trial was the first time he had testified in a CSC trial as a criminal profileApp. App. 499, ll. 20-24.

LaRosa also freely admitted that he had no direct evidence that Respondent was the perpetrator, "I have no evidence of anybody, except to meet that profile that I just explained to you." App. 480, ll. 2-3. On recross, LaRosa, over the objection of defense counsel, testified that he had consulted on hundreds of CSC cases with all kinds of perpetrators, victims, and facts, but that in these cases his testimony was not requested. App. 480, ll. 17 – App. 481, ll. 21.

State's Closing Argument

LaRosa's testimony featured prominently in the State's closing argument; the expert that confirmed Respondent's guilt by linking the minor child's injuries to the Respondent:

> Paul Larosa testified, and I think Jones referred to it as whoie. **I mean it's -- he trained with the Federal Bureau of Investigation, the chief law enforcement agency in the United States of America in this particular field.** And here is the more important thing. **Did he really tell you anything that didn't make sense.** You know before you say, oh, and dismiss it as whoie what he tell you? Well, it's a male. **Looking at it as a crime scene situation we would be looking for an adult male.**

App. 624, ll. 3-11. Having vouched for LaRosa's credibility and skill, the State summarized LaRosa's testimony:

> **Agent LaRosa testified that based on that and based on his review of that and review of the record that would indicate an adult. . . .**
>
> You know, why do that[?] **That's sadistic. Well, that leads into the sexual gratification aspect** of this because it is centered around her genitalia. It's sick. It's sadistic, but there is a sexual basis for why someone would do that. Sick. I can't fathom it, but unfortunately, as we heard it happens, and it happened to [Minor Child].

> And then he also, Agent LaRosa, talked about the fact that **it would have been a male** because in the research and he outlined the research that had been done, the nature of what it is he does, and what not. These situations involve men. **Men are the perpetrators. . . . [LaRosa] [d]id not point and say the Defendant did it. This is where your common sense comes in. Who had the most access to that child during 16 that time? That was an adult male. The defendant.**

App. 624, ll. 17 – App. 625, ll. 16. The State then highlighted statements made by Respondent during his third interrogation by law enforcement, where Respondent conceded that he saw some indications of abuse and that he should have called DSS. App. 53, ll. 8 – App. 54, ll. 2.

The State also invited the jurors to compare their hypothetical actions to Respondent's actions: "[h]ow many of us would look and see that much going on with a three year old and not say or do something unless we had something to hide? Unless we were the perpetrators." *Id.* at 3-6. The State concluded with a slide show of pictures of the minor child from the autopsy interspersed with pictures of the minor child while she was alive. App. 57, ll. 10 – App. 59, ll. 23.

ARGUMENT

I.

The Court of Appeals correctly held the trial judge erred by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the probative value of the expert "offender behavior" evidence, offered as definitive proof of Respondent's guilt, was substantially outweighed by the danger of unfair prejudice as LaRosa's testimony was not probative of whether the Respondent committed the specific acts for which he was standing trial and provided no information helpful to the jury's understanding of the evidence properly before it.

The Court of Appeals Properly Applied the Abuse of Discretion Standard of Review

The State argues that the Court of Appeals "failed to give deference to the trial judge's ruling." Resp't Pet. p. 12. This argument is without merit. The Court of Appeals properly applied the abuse of discretion standard to the trial court's ruling.

The Court of Appeals recognized the highly deferential standard of review from the outset of its opinion, "[w]e review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *Id.* (internal citations omitted).

The Court of Appeals then noted that, despite the deferential standard of review, "[w]e conclude the nature of the challenged testimony in the present case presents exceptional circumstances. Criminal profiling testimony is not probative of an individual's guilt in a particular case." App. 1098.

The Court of Appeals rightly began its analysis with Rule 401 and Rule 403 of the South Carolina Rules of Evidence. Rule 401, SCRE defines "relevant evidence" as "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."

Rule 403, SCRE, states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Court of Appeals then properly noted that, under our precedent, "unfair prejudice means an undue tendency to suggest a decision on an improper basis." App. 1098.

The Court of Appeals correctly concluded that LaRosa's testimony had no relevance to whether the Respondent committed the specific acts he on which he was indicted. LaRosa's testimony should have been excluded under Rule 403, SCRE because it served only to introduce to the jury an unfavorable comparison between the hypothetical profile of someone who might have sexually abused the minor child and Respondent. Moreover, LaRosa's testimony did not make any specific factual issue of guilt or innocence of the Respondent any more or less probable.

Further, the State erroneously alleges that the Court of Appeals "failed to recognize" the restrictions the trial court imposed on Agent LaRosa's testimony. The State claims that the trial court prevented LaRosa from expressly identifying Respondent as "only male with the degree of access" to the child necessary to inflict the injuries and that LaRosa could not testify beyond "his analysis of the victim's wounds." Resp.'t Pet. p. 13.

According to the State, "these limitations were critical aspects of the trial judge's ruling designed to exclude non-probative evidence from the jury." *Id.* The Court of Appeals gave great deference to the trial court's "limitations" on LaRosa's testimony, but rightly determined that, for LaRosa's testimony to have any value to the State, it had to exceed the limitations placed on it by the trial court. App. 456, ll. 10-16; App. 1101 – 1102.

LaRosa was instructed to avoid eliminating Hunt as a suspect. *Id.* Nevertheless his testimony immediately eliminated Hunt as a suspect: **"you would be looking for an adult male."**

App. 478, ll. 9-18 (*emphasis added*). LaRosa's testimony went beyond the mechanics of how the injuries occurred and speculated, under the guise of court-sanctioned expertise, on what kind of person would inflict those injuries. Thus, even under the trial court's unworkable standard, LaRosa's testimony should have been disallowed.

In rendering its opinion, the Court of Appeals examined, at length, opinions from other appellate jurisdictions. These courts have universally held that "criminal profile" testimony is simply not relevant, admissible evidence. App. 1098 – 1107; *Commonwealth v. Day*, 569 N.E.2d 397, 399 (Mass. 1991); *State v. Clements*, 770 P.2d. 447, 454 (Kan. 1989); *United States v. Jones*, 913 F.2d 174 (4th CiApp. 1990); *United States. v Quigley*, 890 F.2d 1019 (8th Cir 1989), *cert denied* 493 US 1091 (1990); *Sanders v. State*, 303 S.E.2d 13, 18 (Ga. 1983); *People v. Robbie*, 92 Cal.App.4th 1075, 112 Cal.RptApp.2d 479 (2001).

These cases are not outliers, they represent the overwhelming consensus of other jurisdictions, state and federal, that "criminal profile" evidence is improper in our adversarial system of justice, where "**[a] necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is.**" *State v. Nelson*, 331 S.C. 1, 15, 501 S.E.2d 716, 723 (1998) (*citing State v. Melcher*, 678 A.2d 146 ,151 (N.H. 1996) ("[u]nlike the era of the Star Chamber, when defendants could be found guilty merely because their character was suspect. . . [w]e presume a person innocent until the State proves guilt beyond a reasonable doubt")) (*emphasis added*).

Accordingly, the Court of Appeal properly applied the abuse of discretion standard of review when concluding that the trial judge erred by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" as the testimony had no probative value.

Criminal Profile Testimony is Not "Generally Admissible" in South Carolina

The State further contends that the Court of Appeals, "misapprehended the scope and purpose of Agent LaRosa's testimony." Resp.'t Pet. p. 15. Specifically, the State alleged that South Carolina precedent "has recognized the propriety of such evidence in some situations." *Id.*

In support of this claim, the State cites to *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992) and *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999). From these two cases, the State asserts that our courts, alone among courts in the United States, "generally allow criminal profiling testimony to be used as evidence in a criminal trial."

This is a curious assertion as neither *Underwood* nor *Spann* directly concern a criminal trial. *Underwood* is a post-conviction relief case. Underwood was convicted of sexually abusing his neighbor's two daughters. At PCR, Underwood alleged that trial counsel was ineffective for, among other grounds, failing to object to expert testimony regarding a "common profile" of persons who sexually abuse children." 309 S.C. at 561, 425 S.E. 2d at 21.

In affirming the denial of his post-conviction relief application, this Court concluded that Underwood's allegations misconstrued what the expert, Dr. Schuh's, testimony was being offered to prove to:

> Dr. Schuh was testifying as to the common behavior of sexual abusers of children and how this behavior might manifest itself in the physical injuries of the children. She offered this testimony to explain why she found only a small tear in the hymen of one of the victims.

Id. at 22, 425 S.E.2d at 563. Dr. Schuh's testimony was being offered to explain how the absence of physical injuries could be consistent with sexual abuse. *See also State v. Lopez,* 306 S.C. 362, 412 S.E.2d 390 (1991) (finding evidence of "battered child syndrome" is admissible when it is based upon *physical* findings to support an inference that a child's injuries were not accidental.).

By contrast, LaRosa's testimony was being offered to show Respondent fit LaRosa's "profile" of the kind of person who would commit these crimes, thus Respondent is a pedophile and must be guilty. *Robbie*, at 1084 (a profile is a collection of conduct and characteristics commonly displayed by those that commit a certain crime).

The Court of Appeals recognized that Dr. Schuh's expert testimony in *Underwood* was distinguishable from LaRosa's testimony as LaRosa's testimony was being offered to prove:

> The purported reason for the State seeking Agent LaRosa's expertise and presenting his testimony was not answer the question of "How could anyone do this to a child?" Yet, the only practical reason for the State to present the answer to this question would be to suggest that [Respondent] fit the profile of a person who would inflict this type of abuse and, therefore, he must have inflicted the burns and the sexual battery.

App. 1102.

In *Spann*, this Court reversed the trial court's refusal to grant Spann a new trial based on after discovered evidence. 334 S.C. at 619, 513 S.E.2d at 98. Spann was convicted in 1981 of the murder, robbery, and sexual assault of Melva Neill and the burglary of her home. *Id.* He received a death sentence. *Id.*

Between July and November 1981, two other women similar in age and appearance to Neill were found murdered. Like Neill, both had been beaten, sexually assaulted, and left naked in their homes. *Id.* Like Neill, one victim – Mary Ring – was found in her partially filled bath tub. The other victim, Bessie Alexander, whose bath tub was inaccessible from inside the house, was found naked on her dining room floor with her body having been "drenched in liquids." *Id.*

Ring was killed prior to Neill. Alexander was killed several months after Neill. Ring's killer was never found. Johnny Hullett was convicted of the crimes against Alexander. App. *Id.* At

the time of the killings, neither the police nor the pathologists perceived any connection between the three crimes. *Id.* at 620-621, 513 S.E.2d at 100.

At the hearing on his new trial motion, Spann presented expert witness testimony from "an expert in crime scene analysis and criminal personality profiling." Spann also presented expert witness testimony from a forensic pathologist and forensic psychiatrist. *Id.* The forensic pathologist testified "that all three women were strangled in unique way" and that there were many other similarities between the crimes. *Id.*

The forensic psychiatrist testified that "the three murders were committed by a single individual, a sexual sadistic murderer" and "opined" that it was "impossible" for Spann to have committed the murders. The psychiatrist also testified that sexual sadistic killers are almost always psychiatrically disturbed white males. Spann is black and has no history of psychiatric problems. *Id.* Hullett is white with a history of mental illness and "bizarre fantasies, a history of childhood abuse, and knowledge of the area."

The trial court denied Spann's new trial motion on the grounds that the connections and similarities between the crimes could have been discovered by his attorneys with the exercise of due diligence. This Court reversed, finding that "the due diligence standard imposed upon trial attorneys cannot fairly be said to be this high." *Id.*

Spann is factually and procedurally distinguishable to Respondent's case. *Spann* was an appeal from the refusal to grant a new trial based on after discovered evidence. The *Spann* Court narrowly focused on defining the "due diligence" standard required for a new evidence motion.

Critically for Respondent's case, the *Spann* Court simply did not address whether any of the expert testimony presented at the new trial hearing would be admissible at a later re-trial. *Id.* If

Spann was retried, it is very likely that some exculpatory profile testimony relating to the type of person who would have committed the killings would be inadmissible.

Other jurisdictions have uniformly rejected defendants' attempts to use criminal profile evidence to infer that the defendant could not have committed the crime charged because they did not match the profile of a typical offender. *State v. Person,* 564 A.2d. 626 (Conn. Ct. App.1989) (no abuse of discretion in rejecting expert testimony that defendant did not fit profile of a pedophile); *Douglas v. United States*, 386 A.2d 289 (D.C.App.1978) (no error excluding testimony by a psychologist on defendant's incapacity to commit type of sexual offenses with which he was charged as this testimony would have usurped jury's truth-seeking function).

Accordingly, the Court of Appeals correctly held that the trial court erred in admitting the SLED "criminal profiler" Paul LaRosa's testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the probative value of LaRosa's testimony was substantially outweighed by the danger of unfair prejudice as the evidence was not probative of whether the Respondent committed the specific acts for which he was standing trial

The state has not offered, and cannot offer, any special and important reason for this Court to grant certiorari in this case. *See* Rule 242(b), SCACR. Therefore, this Court should deny the petition for writ of certiorari.

II.

The Court of Appeals correctly applied its harmless error analysis when concluding that Agent LaRosa's testimony could not have been harmless error with respect to Respondent's conviction for homicide by child abuse.

The State argues that the Court of Appeals failed to consistently apply its harmless error analysis to Respondent's homicide by child abuse charge because the Court of Appeals found LaRosa's testimony constituted harmless error with respect to Respondent's conviction for unlawful conduct toward a child. Resp't. Pet. p. 19. The State does not argue that the Corut of Appeals erred in rejecting the application of harmless error with respect to Respondent's convictions for criminal sexual conduct with a child, first degree, and inflicting great bodily injury upon a child. *Id.*

The key factor for determining whether a trial error constitutes reversible error is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *State v. Charping,* 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993) (quoting *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), *overruled on other grounds by Franklin v. Catoe,* 346 S.C. 563, 552 S.E.2d 718 (2001)).

Whether an error is harmless depends on the circumstances of the particular case. *State v. Mitchell,* 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.

Here, the Court of Appeals consistently and correctly applied its harmless error analysis. The State alleged that Respondent inflicted the injuries on the child and was guilty of homicide by child abuse as a principal under S.C. Code Ann. 16-3-85(A)(1): "A person is guilty of homicide by child abuse if the person 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."

To prove that "circumstances manifesting an extreme indifference to human life" existed, the State must show a defendant performed a deliberate act that he or she knew would create a risk of death to the child. "A deliberate act in the face of such knowledge is a reckless disregard of the risk, and thus demonstrates an extreme indifference to the child's life." *See State v. McKnight,* 352 S.C. 635, 646, 576 S.E.2d 168, 173 (2003) (finding the deliberate ingestion of cocaine in the face of "public knowledge that usage of cocaine is potentially fatal ... was sufficient evidence to submit to the jury on whether [the defendant] acted with extreme indifference to her child's life").

Thus, to prove Respondent acted with extreme indifference to Minor's life, the State must have evidence, apart from LaRosa's testimony, amounting to proof beyond a reasonable doubt that Respondent failed to secure medical attention for Minor with the knowledge that doing so would create a risk to the child's life. *State v. Phillips*, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014) *aff'd as modified* 416 S.C. 184, 785 S.E.2d 448 (2016).

Apart from LaRosa's testimony, the State produced little evidence that Respondent was aware of the seriousness of Minor's medical condition. During all three of Respondent's interrogations, including the final interrogation spanning three hours, and at trial Respondent adamantly denied any knowledge of the cigarette burns to the minor child's genitals. App. 745, ll. 9-22. Respondent showed no understanding of the seriousness of Minor's medical condition at the time.

After prodding by police, he admitted that he should have done something when he realized Minor was sick to some degree. Respondent stated that he did not act because he was afraid that he

would lose custody of his son if he sought medical attention for Minor. App. *Phillips,* 408 S.C. at 229, 758 S.E.2d at 201-202.

Testimony by his former co-defendant, Hunt, was entirely self-serving and uncreditable. She had taken a plea deal which resulted in her changing her story and "remembering" incidents involving Respondent and minor child. App. 399, ll. 15 – App. 400, ll. 25. Even then none the incidents remembered explained the pattern of cigarette burns. App. 392, ll. 19-25. Finally, prior to taking the plea deal she wrote a letter to Respondent's mother assuring her of Respondent's innocence and her love for him; while simultaneously carrying on an affair with a correctional officeApp.[2] App. 353, ll. 8 – App. 355, ll. 22.

LaRosa's testimony was essential for the State to show that Respondent neglected Minor "under circumstances manifesting an extreme indifference to human life." LaRosa testified immediately after the completely discredited Hunt. He was granted expert witness status by the trial court and asserted with god-like certainty that the person responsible for Minor's death was a male between the ages of twenty and forty with access to the child. Unlike the pathologist, LaRosa expressly excluded Hunt as a potential source of the cigarette burns.

LaRosa's testimony strongly implied that Respondent was a sadistic pedophile who derived sexual gratification from inflicting pain on a small minor child. Unsurprisingly, LaRosa featured prominently in the State's closing arguments:

> Paul Larosa testified, and I think Jones referred to it as whoie. **I mean it's -- he trained with the Federal Bureau of Investigation, the chief law enforcement agency in the United States of America in this particular field.** And here is the more important thing. **Did he really tell you anything that didn't make sense.** You know before you say, oh, and dismiss it as whoie what he tell you? Well,

---

[2] The letters from Hunt to Respondent's mother and to the correctional officer were entered into the record as Defense Exhibit No. 1 and 2, respectively. App.917.

> it's a male. **Looking at it as a crime scene situation we would be looking for an adult male. . . .**
>
> **Agent LaRosa testified that based on that and based on his review of that and review of the record that would indicate an adult. . . .**
>
> You know, why do that[?] **That's sadistic. Well, that leads into the sexual gratification aspect** of this because it is centered around her genitalia. It's sick. It's sadistic, but there is a sexual basis for why someone would do that. Sick. I can't fathom it, but unfortunately, as we heard it happens, and it happened to [Minor Child].
>
> And then he also, Agent LaRosa, talked about the fact that **it would have been a male** because in the research and he outlined the research that had been done, the nature of what it is he does, and what not. These situations involve men. **Men are the perpetrators. . . . [LaRosa] [d]id not point and say the Defendant did it. This is where your common sense comes in. Who had the most access to that child during 16 that time? That was an adult male. The defendant.**

App. 624, l. 3 – 625, l. 16. *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (finding that improper expert opinion on the ultimate issue in dispute at trial was not harmless.).

The State's theory was that Respondent failed to act because he feared that his sadistic sexual abuse of Minor would be discovered. Thus, LaRosa's testimony was critical to the State's case as evidence that Respondent neglected Minor "under circumstances manifesting an extreme indifference to human life."

By contrast, unlawful conduct towards a child punishes a wider variety of acts or omissions:

> It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
>
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or

(3) wilfully abandon the child.

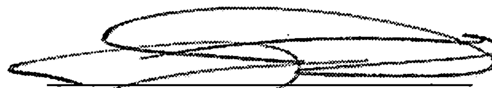
S.C. Code Ann. 63-5-70(A). Looking to Dr.p. Schandl and Respondent's testimony makes clear that the Court of Appeals consistently applied its harmless error analysis to both the homicide by child abuse conviction and the conviction for unlawful conduct towards a child.

Therefore, the Court of Appeals was correct in finding that the trial court's improper admission of LaRosa's testimony was not harmless because it was critical to the Respondent being found guilty of homicide by child abuse. *State v. Mitchell,* 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). Thus, this Court should deny the petition for writ of certiorari.

CONCLUSION

Respondent respectfully requests this Court deny the petition for writ of certiorari. In the event this Court grants the petition for writ of certiorari, Respondent respectfully requests the opportunity to brief fully the issue presented. Further, Respondent requests that if this Court were to reverse the Court of Appeals' ruling, then his case must be remanded to the Court of Appeals for a decision on the remaining appellate issues, which were not ruled upon previously. *See State v. Grovenstein*, 335 S.C. 347, 354 n. 6, 517 S.E.2d 216, 219 n. 6 (1999) (remanding to the Court of Appeals for consideration of remaining issues on appeal).

Respectfully Submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marlboro County
Honorable J. Michael Baxley, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Opinion No. 5473 (S.C. Ct. App. filed 3/15/2017)
12-GS-34-00037-38, 135 & 627

THE STATE,

PETITIONER,

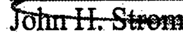
V.

ALEXANDER CARMICHAEL HUCKABEE, III,

RESPONDENT.

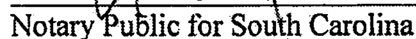
CERTIFICATE OF SERVICE

I certify that a copy of the Return to Petition for Writ of Certiorari in this case has been served on William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Alexander Carmichael Huckabee, #355895, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 11th day of July, 2017.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE ME this 11th day of July, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025