STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Petitioner,

vs.

ROBERT JARED PRATHER,

Respondent.

STATE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Rules 219, 221, & 240 SCACR, Respondent the State of South Carolina petitions the Honorable Court of Appeals for Rehearing and suggests Rehearing En Banc.

This Court, in a published Opinion, in a vote of 2 to 1, reversed the murder and robbery convictions of Robert Jared Prather because the majority found the testimony of crime scene analyst Paul LaRosa was not proper Reply or Rebuttal testimony and the admission of this testimony was not harmless beyond a reasonable doubt. State v. Prather, Opinion No. 5514 (Ct. App. Filed Sept. 6, 2017). The majority's holding misapprehended or overlooked the appellate court record or misapprehended or overlooked Respondent's arguments; and, therefore, the Petition for Rehearing or Rehearing En Banc must be granted for several reasons.

1. **THE MAJORITY MISAPPREHENDED THE RECORD**: Respondent submits that the majority misapprehended the record. As pointed out by the dissent a fair reading of the record reveals the following:

> At trial, Prather testified to being outside Victim's residence when the purported "staging and undoing" occurred. Moreover, Prather claimed he did not participate in any of these acts and testified Phillips was inside the residence when these acts occurred. Through his testimony, Prather inferred that only one person committed these acts. Conversely, the State's reply testimony contradicted Prather's notion that only one person participated in these acts. Importantly, the testimony was in response to Prather's testimony and was introduced to counter Prather's testimony—even though it did not directly implicate Prather. Specifically, LaRosa's testimony indicated two individuals were at the crime scene based on the types of personalities involved in "staging" and "undoing."

2. **CONCESSION BY APPELLANT**. Prather made a critical concession in his brief before the Court acknowledging that LaRosa's reply testimony contradicted Prather's trial

testimony. (Final Brief of Appellant, p. 11). The Court of Appeal's majority ignored this concession and its impact. Specifically, Prather conceded in his brief:

> 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.

(Final Brief of Appellant, p. 11, ll. 12-19)(emphasis added). This concession, that LaRosa's testimony contradicted Prather's trial testimony **was pointed out to this Court** in Respondent's brief. **(Final Brief of Respondent, p. 15, footnote 12).** Respondent also pointed out in the same footnote that this concession ended the inquiry whether the testimony was proper Reply. **(FBOR, p. 15, n. 12).** This concession was also pointed out to this Court by Respondent at oral argument. The majority completely overlooked this concession [part of the Appellate Court Record] in its Opinion and overlooked Respondent's argument regarding the same; and, this concession makes the testimony of LaRosa proper Reply or Rebuttal testimony beyond any question or argument. See State v. South, 285 S.C. 529, 311 S.E.2d 775 (1985)(Any testimony which is presented to rebut, contradict, or impeach the case presented by the defense is proper on reply).[1]

Thus in a murder prosecution, where the defendant testified the deceased victim grabbed the barrel of the pistol, as it was fired, it was proper to present reply testimony there were no powder burns on the deceased hands, which tended to show the deceased did not have hold of the barrel of the pistol at the time it was fired. State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904).

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[1] *See also* State v. Bell, 263 S.C. 239, 209 S.E.2d 890 (1974); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972).

Similarly, in a murder prosecution where the defendant testified he shot his son three (3) times in rapid succession while his son was still standing, the testimony of the pathologist that the victim was shot the final time while lying on the floor with his head resting against the floor was proper Reply. State v. McDowell, 272 S.C. 203, 205, 249 S.E.2d 916, 917 (1978)(per curiam).

The testimony of LaRosa was no different. As Prather conceded in his brief, the testimony of LaRosa directly contradicted his trial testimony. (Final Brief of Appellant, p. 11). It "...**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, it was offered to impeach Prather's version of events regarding Stewarts' death ..." (Final Brief of Appellant, p. 11, *emphasis added*). The evidence was therefore proper Reply. Id. This Court must grant the Petition for Rehearing or Rehearing En Banc as the majority overlooked Prather's concession in his brief and Respondent's argument regarding the same. State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986)("The admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is **arguably** contradictory of and in reply to earlier testimony."); State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984)(exact same); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980)(same).

3. **CONTRADICTED AND REBUTTED PETITIONER'S TESTIMONY**; The majority also misapprehended or overlooked Respondent's argument that simply because Reply testimony could have been offered in the State's case in chief, does not mean the evidence is not proper in Reply. The majority seems to be under the mistaken impression that simply because evidence is *admissible* in the State's case in chief, it is not proper on Reply. This is incorrect.

See State v. Stewart, 283 S.C. 104, 320 S.E.2d. 447 (1984) (admission of reply testimony of an admission by defendant the "he stabbed the old woman" was proper reply to contradict the alibi claim, where a defendant's admission would have been admissible in the case in chief). Respondent agrees that reply testimony may not be used *to complete* the State's case in chief, but that does not mean that if it could have been admitted in the case in chief it cannot be admitted on reply. Cf. State v. Robinson, 223 S.C. 314, 75 S.E.2d 465 (1953); State v. Farrow, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998).

However, admissibility in the State's case in chief is the very test of non-collateral matter admissible in Reply. State v. Brock, 130 S.C. 252, 126 S.E.2d 28 (1924)(Reply testimony should not be admitted where the testimony involves a collateral issue.). In determining whether or not the matter is a collateral issue, the test is whether the party offering the Reply testimony would have been allowed to prove the fact in question as part of its case; if so, the matter is **not collateral**. State v. Bailey, 279 S.C. 437, 308 S.E.2d 795 (1983); State v. Brock, 130 S.C. 252, 126 S.E.2d 28 (1924).[2] This was also set forth in Respondent's brief. **(FBOR, pp. 14-15).**

For example, in a murder case, where the defendant testified the deceased victim grabbed the barrel of the gun, as it was fired, it was proper to present Reply there were no powder burns on the deceased hands, which tended to show the deceased did not have hold of the barrel of the gun at the time it was fired. McDaniel, 68 S.C. 304, 47 S.E. 384. Obviously, the fact that the deceased had no powder burns on his hands could have been admitted in the State's case in chief as part of the findings at autopsy; however, this testimony **was not necessary to complete the State's case** in chief. It was therefore proper Reply once the defendant testified the deceased

[2] *See also* State v. Griffin, 153 S.C. 11, 150 S.E. 312 (1929); State v. Johnson, 137 S.C. 7, 133 S.E. 823 (1926); State v. Underwood; 127 S.C. 1, 120 S.E. 719 (1923).

grabbed the barrel of the gun to rebut and contradict it. Id. Because the probative value became enhanced on reply did not preclude its admission on reply. LaRosa's testimony is similar.

In McDowell, 272 S.C. at 205, 249 S.E.2d at 917, the testimony of the pathologist was admissible in Reply once the defendant stated he shot the victim all three (3) times while the victim was standing and the pathologist testified the last shot was fired while the victim's head was resting on the floor. Obviously, the testimony of the pathologist [offered in Reply] could have been admitted in the States' case in chief, but it was not necessary to complete the State's case in chief. Once the defendant claimed he fired all three (3) shots while the victim was standing, the probative value increased to rebut and contradict the defendant. Id.

The same is true in the present case. The testimony of LaRosa could have been offered in the State's case but it was not necessary to complete the State's case. Prather testified that Phillips was alone in the house without Prather for 8-10 minutes and that he, Prather, did not commit the crime. Prather did not assert in this trial (unlike the mistrial) that Rabon may have committed the crime. Once Prather testified and pointed the finger at Phillips as the sole perpetrator [**as will be shown below**], the testimony became admissible as proper Reply or Rebuttal testimony as LaRosa's testimony described two distinct and conflicting personalities, and therefore two different individuals, present at the crime scene in contradiction to Prather's testimony. As Prather conceded in his brief, LaRosa's testimony directly contradicted Prather's testimony at trial. (FBOA, p. 11). Because the majority overlooked or misapprehended this law and these facts, the Petition for Rehearing or Rehearing En Banc must be granted.

4. **REFERENCE TO MATTER NOT IN THIS TRIAL RECORD BUT THE MISTRIAL RECORD**: The majority also mistakenly misapprehended and overlooked the trial record in this case in finding Prather's trial testimony demonstrated LaRosa's testimony was not proper Reply. A portion of the alleged language the majority quoted in footnote 4 to support its Opinion **is not contained in the record of the trial of this case, but was from the earlier mistrial.** In its Opinion, the majority quoted the following testimony alleging Prather testified on cross-examination as follows:

> [State] That [Phillips] goes back in?
>
> [Prather]: Yes.
>
> [State]: That [Phillips] must be the one that carved rapist?
>
> [Prather]: Yes, but there's also someone else in the house?
>
> [State]: So now you think Mr. Rabon did it?
>
> [Prather]: I don't know who did it sir.

(Opinion, p. 21, n. 4). This testimony is contained nowhere in the trial of this case, much less on cross-examination. **(ROA, pages 651-731).** Instead, the portion of testimony quoted by the majority is actually testimony from the earlier mistrial which was not introduced in any manner to the jury in this case. **(See ROA, Vol. II., page i [Index], & pages 871-939).** Since, this mistaken testimony is contained nowhere in the trial of the case on appeal, the majority cannot use this quotation to support its finding that LaRosa's testimony was not proper Reply or Rebuttal to Prather's testimony in this trial. The Petition for Rehearing or Rehearing En Banc must be granted.

5. The majority also misapprehended the appellate court record and Respondent's arguments in its erroneous finding of what Prather claimed in his testimony at trial. In reading Prather's trial testimony *in this case* as a whole, it is clear Prather was not asserting Ron Rabon had anything to do with the victim's murder. **(ROA, pages 651-731).** The gist of Prather's testimony was Phillips committed the murder alone, carved "rapist" in the victim's buttocks and staged the crime scene and covered up the victim. Prather testified that Rabon would have had nothing to do with it. **(ROA, pages 651-731).** The following portions of Prather's testimony at trial are significant and revealing:

> Q: When y'all get back, Ron Rabon goes to bed; correct?
>
> A: Right.
>
> Q: Did you see him anymore?
>
> A: No.
>
> Q: He's done?
>
> A: Yeah.

(R. 690, ll. 13-20).

> Q: When you come out and sit in that car, there's only two people in that house at that point, other than Mr. Stewart. That's Ronald Rabon in that back bedroom who you've never heard anymore from that night; right?
>
> A: Right.
>
> Q: And your acquaintance, Joshua Phillips; right?
>
> A: Yes, sir.
>
> Q: You sit in the car eight to ten minutes and then he [Phillips] comes out and joins you; is that correct?
>
> A. Yes.
>
> Q: And that's when y'all take off?
>
> A: Yes, sir.

(R. 714, ll. 19 – 715, ln. 5).

Q: Now, let's talk about this crime scene. It's your testimony that you're not the one responsible for leaving Gerald Stewart in this condition?

A: No, I'm not.

Q: That you didn't beat Gerald Stewart down onto that sofa; correct?

A: That's correct. I didn't.

Q: You didn't beat him down pull his pants back and carve rapist. Is that what your saying?

A: No, I think it's really fucking disgusting whoever did it.

Q: You would agree looking at State's 39 whoever did this had to actually pull his pants down because those cuts go down way on down the buttocks; right?

A: Okay.

Q: You'd agree?

A: I would agree.

Q: Whoever did this actually spelled the word right: didn't they?

A: I guess they - - I don't know what it is.

Q: R, you see that R?

A: Yes, I see that R.

Q: You see an A?

A: Okay.

Q: You see an I, a P, right here. See that?

A: Yeah.

Q: You see that I right here?

A: Yeah.

Q: Do you see the S?

A: Is that an S?

Q: I am asking you. Do you see this S?

A: Uh, yeah.

Q: Do you see the T?

A: Yes.

Q: Okay. So you do see the word rapist?

A: Yes, sir.

Q: And you're saying you didn't do that?

A: No, sir.

Q: You didn't pull his pants down and carve on him?

A: No.

Q: And you didn't go into the bedroom and take this object out of that bedroom, this sex object, and place it beside Gerald Stewart's body, did you?

A: This last time I saw it, it was *at Josh's feet* in that room. And, no, because I'm not touching that thing.

Q: You're not responsible for the cigarette burn on Gerald Stewart's finger; is that your testimony?

A: The cigarette burn?

Q: The cigarette burn?

A: No, I'm not responsible for the cigarette burn.

Q: And you're also saying you're not the one who took this blue blanket, this comforter and covered up that body. Is that your testimony?

A: Yes, sir. I don't recall seeing that blue blanket anywhere in the house.

Q: And you didn't take this blue pillow and put it over his head?

A: No.

Q: And *Joshua Phillips* was alone in the house for eight to ten minutes?

A: Somewhere around there.

Q: You would agree with me, wouldn't you, whoever did this, whoever did this is cruel and cold hearted. You would agree with me?

A: I would agree.

Q: You would agree this is just a wicked, wicked horrible act; right?

A: Completely.

Q: It's depraved; correct?

A: Yes.

Q: Have you ever heard this quote, monsters and ghosts are real. They exist within us all and sometimes they win?

A: Yes, I have.

Q: Who said that?

A: I'm not quite sure.

Q: If I showed you your Facebook Page, a Stephen King quote?

A: (Nods affirmatively)

Q: Whoever did this horrible deed to that man that day, that monster came out of them, didn't it?

A: Well, to put that in perspective. I heard that on a criminal minds episode, you know, how they do the quotes at the end.

Q: Whoever did this to Gerald Stewart, that monster in them came out, didn't it?

A: I would say it did.

Q: That monster won, didn't it?

A: Well, it appears to me they were *very angry. I wasn't angry*, sir.

Q: And Gerald Stewart, he lost that night, didn't he? He died?

A: Unfortunately, yes, sir.

Q: Because whoever was carving this word rapist, this R, this A, this P, this I, this S, this T, whoever carved that was carving it while Gerald Stewart was dying. That's wicked; isn't it? Isn't it?

A: Yes.

Q: And you would admit Gerald Stewart did not deserve that?

A: I would admit, yes, he did not deserve that. I don't think anyone deserves that.

Q: He didn't deserve to die; right?

A: Well, no one deserves to die, sir, but I didn't kill him. And I was put in a very, very horrifying situation. It was terrible.

Q: So you were put in this situation?

A: I didn't know what I was walking back into.

Q: And when *Josh* came outside, you admit eventually its found that *he* had money belonging to Gerald Stewart in his pockets. You admit that?

A: Throughout the investigation I saw pictures of it while I was in jail.

Q: You don't deny this Coca-Cola box ended up in your car?

A: I saw pictures of that as well.

Q: You don't deny the dead man's wallet, the old man, his wallet, you knew *Josh* had it?

A: *Josh* told me on the way to *the hospital* [for the alleged rape or sexual assault], he had some - - I said, do you know the address of the guy's name. And he said no. *He* said, but *I* got his address or an ID or something like that.

Q: So the wallet was taken to help the situation?

A: You'll have to ask *Joshua Phillips* that.

Q: I'm asking you?

A: I didn't take the wallet, sir. I didn't look for anything for an address.

Q: This Coke collection doesn't have an address?

A: No.

Q: The money doesn't have an address?

A: No.

Q: And *whoever* took this stuff and did this horrible despicable thing to Gerald Stewart, obviously had something to cut with, didn't they?

A: I would assume.

Q: And you don't deny underneath this Coca-Cola box, there was a knife?

A: In the passenger's seat floorboard.

Q: In your car?

A: Yes. That could have been there. *Josh* could have put that there. I was never in the passenger seat of my own car.

(R. 723, ln. 1 – 728, ln. 15)(emphasis added). There is no question, from this testimony, Prather was directly or impliedly pointing the finger at Phillips as the perpetrator alone. It was Prather who testified at trial *and* told the nurse and police at the hospital that Phillips was sexually assaulted [or raped] by the victim. It was Prather who testified at trial that Phillips attacked and

was hitting and kicking the victim before they left the house together [before Phillips re-entered the house].

Further, on re-direct, Prather testified as follows:

Q: Jared, did *you* have a knife?

A: No, sir.

Q: Did *you* have a knife in your car at all?

A: No, sir.

Q: And had *you* ever seen that knife until you got a look at the evidence?

A: No sir. You showed me a picture of it about maybe three months after I was in jail.

Q: And the Coca-Cola box, had *you* ever seen that until you saw the pictures of it?

A: No, sir.

Q: And *you* didn't have anything in your possession, in your pockets belonging to Gerald Stewart, did you?

A: No sir.

Q: Did *you* take anything out of Gerald Stewart's at all that didn't belong to you?

A: No.

Q: Did *you* carve him?

A: No

Q: Look at the jury. Did *you* carve him?

A: No.

Q: Did *you* murder him?

A: No, I didn't.

Q: Did *you* kill him?

A: No.

(R 730, ln. 9 – 731, ln. 8)(emphasis added).

It is clear from a review of Prather's **entire testimony in this trial**, including that above, he was pointing the finger at Phillips as the sole killer, and not himself or Rabon. He never asserted in this trial, either directly or indirectly, that Rabon had anything to do with the victim's murder.[3] Additionally, based on the fact, admitted by Prather on cross-examination, that he had never told police on any occasion, that Phillips returned to the victim's home and remained inside for 8 to 10 minutes, it is clear **at trial** Prather was pointing the finger at Phillips as the lone perpetrator. Further, Ron Rabon had no motive to carve *rapist* in the victim's buttocks or cover his body with a blanket or then his head with a pillow. It was Phillips **who Prather asserted** was sexually assaulted by the victim. Further, Rabon had no motive to beat or kick the victim. It was Phillips **who Prather asserted** was kicking the victim as the two (2) of them left the house for the first time. Finally, the jury would have to completely disbelieve Rabon's trial testimony and *Prather's trial testimony* to believe Rabon had anything to do with the crime. In the face of Prather's concession in his own brief, that LaRosa's testimony directly contradicted his trial testimony **(Final Brief of Appellant, p. 11)**, the majority has overlooked or misapprehended the appellate court record in this case, and Respondent's argument LaRosa's testimony clearly contradicted Prather's trial testimony.

Further, as the dissent correctly pointed out, Prather's trial testimony directly and by implication pointed the finger at Phillips as the perpetrator, not himself. Rabon, who was not charged with any crime, and had no motive, testified he fell asleep after midnight, which Prather conceded, and was awakened by police after police had found the victim's body. Rabon had testified before Prather. When Prather pointed the finger at his co-defendant [Phillips] as the

[3] Respondent submits Prather did not assert in this trial, directly or indirectly, that Rabon had anything to do with the victim's murder, because in the first trial he appeared to be "grasping at straws" when he made this assertion. (See this Court's quote in footnote 4).

sole perpetrator and claimed **for the first time at trial**, that Phillips re-entered the residence and remained in the residence for approximately 8-10 minutes and then came out with something in his hands, it was then the testimony of LaRosa was proper in Reply. LaRosa testimony directly contradicted Prather's trial testimony that one (1) person, Phillips, committed the crime, the staging, and the undoing. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986); State v. South, 285 S.C. 529, 311 S.E.2d 775 (1985)(Any testimony which is presented to rebut, contradict, or impeach the case presented by the defense is proper on reply). **(See also Final Brief of Appellant, p. 11).** This Court must grant the Petition for Rehearing or Rehearing En Banc.

6. The majority also misapprehended and overlooked the record and misapprehended and overlooked Respondent's argument in erroneously finding this was broad crime scene testimony or general testimony as to the circumstances of the crime that should have been offered in the State's case in chief. A review of the record shows the jury had already been informed of what was found at the crime scene through several different witnesses, not LaRosa. The State had completed its case in chief **and** overcome a motion for a directed verdict.[4] La Rosa's testimony was not necessary to complete the State's case in chief **and** was not offered for that purpose. It only became proper reply when Prather testified.

As Prather **concedes in his brief**, the entire testimony of LaRosa was offered to contradict Prather's version of events and his claim of non-involvement in the victim's murder. **(Final Brief of Appellant, p. 11).** The majority completely overlooks the fact that **in order for the expert to contradict Prather's trial testimony**, [which is the very purpose of Reply or Rebuttal testimony] he had to explain to the jury what he found that was significant from

[4] As shown above, there was also significant testimony about the crime scene brought out through cross-examination of Prather.

examining the crime-scene photographs, the autopsy photographs, and the crime scene video-tape, i.e. the crime-scene was "staged" and the staging was then "undone." Because of this finding, *which was based on what was found at the crime-scene*, and based on his experience and training, there were two (2) competing emotions at work in the crime-scene leading to his expert opinion there were **two (2) personalities**, i.e. two (2) persons present in the crime-scene. The expert could not explain to the jury his findings, conclusions, and ultimate opinion, which contradicted and impeached Prather's trial testimony **[FBOA, p. 11]**, without explaining what was significant in the crime scene. As a result, this testimony was necessary and proper Reply in that it contradicted Prather's testimony. It **was not** more crime scene testimony. The majority's analysis misapprehended and overlooked this fact. The Petition for Rehearing or Rehearing En Banc must be granted.

7. **HARMLESS ERROR** :The majority also overlooks and misapprehends in ruling first on the inadmissibility of the Reply testimony and then in contrast considering whether any error in admitting the evidence was harmless. The majority cannot have it both ways.

First, the majority held that the testimony was not proper Reply because LaRosa's testimony did not refute or contradict Prather's testimony.[5] The majority noted LaRosa testified at least two (2) individuals were involved in the crime scene. The majority pointed out in a footnote that Prather testified Phillips and Rabon were still inside the home when he was outside

[5] As previously shown, this finding is in direct contravention to Prather's concessions and admissions in his appellate brief that LaRosa's testimony did contradict and impeach Prather's assertions in his trial testimony in this case. (FBOA, p. 11).

in the car.[6] The majority asserted this shows the testimony was not proper Reply because it did not directly contradict Prather's testimony. (Opinion, pp. 20-21).

However, in determining the admission of LaRosa's testimony was not harmless, the majority then makes the completely inconsistent finding that LaRosa's testimony could not have been harmless because he was clearly referring to Phillips and Prather [not Rabon] when he testified two (2) people were active in the crime scene. (Opinion, 22-23). If LaRosa's testimony contradicted Prather's testimony at trial, then it is proper Reply testimony. State v. Todd, supra.; State v. South, supra. (Any testimony which is presented to rebut, contradict, or impeach the case presented by the defense is proper on reply). If it did not contradict Prather's testimony at trial, as the majority asserts early in its Opinion (Opinion, pp. 20-21), it could not have been prejudicial and would have been harmless beyond a reasonable doubt. If LaRosa was clearly referring to Phillips and Prather as the majority asserts on page 22 & 23 of its Opinion, then the testimony clearly contradicted Prather's trial testimony that he was not involved in the crime or the crime scene.

It is one or the other. It cannot be both. It is either proper Reply in that contradicted Prather's testimony. If it did not contradict Prather's testimony then it was harmless beyond a reasonable doubt.

In summary, the majority has overlooked or misapprehended that its reasoning in finding the testimony was not proper Reply and then in finding the error was not harmless is inconsistent. This Court must grant the Petition for Rehearing or Rehearing En Banc.

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[6] As previously shown, the testimony actually quoted by the majority at the end of footnote 4 is not contained within the transcript of this trial.

8. **HARMLESS ERROR**: The majority overlooked and misapprehended Respondent's arguments and the appellate court record in finding the admission of the Reply testimony was not harmless beyond a reasonable doubt. The dissent is correct in determining the error was harmless beyond a reasonable doubt. State v. Farrow, 332 S.C. 190, 504 S.E.2d 131 (Ct. App. 1998).

The evidence of Prather's guilt was overwhelming. Ron Rabon, an independent witness to the events that night, testified Prather and Phillips referred to themselves always as "Jerry" and "Ray." (R. 521-22, 530-31). In fact, Rabon testified he did not even know who Jared Prather and Joshua Phillips were that night but only knew them by the *fake names* they used at the victim's residence. This indicates a nefarious purpose for both Prather and Phillips being in the victim's residence. The majority overlooks this significant fact in both its statement of the facts and in its harmless error analysis. It is mentioned nowhere in the Opinion, including its harmless error analysis. Even Prather admitted on cross-examination that if this testimony was true, it sounded suspicious, i.e. he and Phillips were up to something or no good. (R. 680, ln. 9 – 681, ln. 4).

Rabon also testified he was suspicious of the men ["Jerry" and "Ray"] from the beginning and told the victim he needed to get the men out of the house. (R. 520-28). Rabon also testified Prather ["Jerry"] threatened or implied a threatened homosexual assault of Rabon causing Rabon to go to his room and call his girlfriend. (R. 525, ll. 1-24). According to Rabon, the threat of a homosexual assault that night was first (1st) brought into the facts surrounding the victim's murder **by Prather** ["Jerry"]. (R. 525, ll. 1-24). This is mentioned nowhere in the majority's opinion. Could this be where Prather first got the idea to "stage" the crime scene by

carving "rapist" on the victim's buttocks? The majority overlooks this fact. This was for the jury to decide.

Further, Rabon's testimony directly contradicted Prather's testimony regarding the sequence of events that night. Rabon testified Prather left the residence alone [to return Phillips' clothes to his brother's residence]. (R. 531-34). Prather disputed this in his trial testimony.

During the time Prather was gone, Rabon left his room and saw **a consensual sexual encounter** between "Ray" [Phillips] and the victim on the living room couch and in the victim's bed. **As a result, there was no rape or sexual assault of "Ray" [Phillips].** (R. 531-35, 543). The alleged sexual assault was a concoction by "Jerry" [Prather] and "Ray" [Phillips] after the fact. This would also explain why Phillips covered the victim with a blanket after the fact. Phillips knew there was no rape or sexual assault.

Rabon testified that after Prather left alone for a period of time, Prather returned and called out for "Ray" [Phillips]. Rabon testified Prather and *the victim* then left the residence together. This was just shortly after Rabon saw the victim and Phillips engaged in the consensual sexual encounter. (R. 531-35, 544). There was no altercation between Prather and the victim about a sexual assault of Phillips at that time. (R. 531-35, 544). A bartender testified and confirmed Prather and the victim came to his bar in the Congaree Vista near closing time. The victim was intoxicated and drinking. Prather was not. The two (2) men eventually left with Prather driving. The bartender saw no marks of a beating on the victim, i.e. Prather and the victim went back the victim's residence **together and the victim was unhurt**. (R. 548-62). The murderous assault and staging and undoing occurred after the victim and Prather returned to the victim's residence **together**.

Prather also admitted on cross-examination he never told police about any "drug run" *for the victim*, Gerald Stewart, including in his written statement. **(R. 699-700).** This was a totally new occurrence *or* invention of Prather at trial. It was after this alleged drug run *for Stewart* that Prather alleged the victim met him **coming out of his bedroom** after allegedly assaulting Phillips. This new claim was impeached at trial. Prather *had never told police of the drug run for Stewart, admitted he never told police of the alleged drug run for Stewart* and had also told police *he was confronted at the front door* by the victim after *he [Prather] returned Phillips clothes to his brother's residence.* **(R. 699, ll. 12 – 700, ln. 16, See also R. 599-601).**

Prather testified at trial he barely knew Phillips. He stated Phillips was an acquaintance of an acquaintance. (R. **678-80**, **682**, ll. 2-25, **683**, ll. 11-16, **685**, ll. 17-23, **688**. ll. 9-13). An emergency room nurse testified Prather informed her that he and Phillips had been friends for years. That was one reason Prather gave her for assaulting the victim.

Prather also testified at trial that he had only known the victim about 1 month. (R. 678). However, Prather had told police he had known the victim for approximately 5 months. (R. 588, ll. 21-24 – 589, ll. ln. 3).

Prather denied at trial having been at the victim's house on the 20th, the day before the murder. (R. 681, ll. 5-14). However, Rabon testified Prather was at the victim's residence on the 20th, the day before the afternoon and night of the murder. Phillips ["Ray"] was not even there that night. (R. 519-20).

Prather testified at trial he did not threaten Phillips after Phillips initial altercation with the victim. (R. 686-87). However, Rabon testified Prather did threaten Phillips after his initial altercation with the victim. (R. 526-27).

Prather denied making any statement to Sergeant Kleckley at all. (R. 702, ll. 8-19 & 708, ll. 16-19). However, Sgt. Kleckley testified Prather told him: He left and returned to the victim's residence. The door was locked and he beat on the door. The victim came to the door and he was in the nude. He pushed past the victim and saw Phillips was not on the couch. He found Phillips in the bedroom with his underwear on. Prather stated he "beat the shit" out of the victim. Prather stated he laid some devastating blows on the victim. Prather made a gesture with his fist, hitting the palm of his other hand. Prather then walked off from Sgt. Kleckley *to smoke a cigarette*. (R. 187-189).

Further, Prather's testimony is simply not credible on its face. Prather testified Phillips came out of the victim's house on the last occasion with something in his hands but he [Prather] could not tell and did not know what it was. However, Prather admitted Phillips then walked to his [Prather's] car and got in the passenger seat next to Prather. The Coca Cola collector's box was found later by police in the front floorboard of Prather's car. It is simply physically impossible for Prather not to have seen what Phillips had in his hands when Phillips **got in the front passenger seat of Prather's car and placed the Coca Cola collector's box in the front floor board of Prather's car**. (R. 712, ln. 10 – 715, ln. 5, & 727-28). Prather admitted before the jury that if he was lying about one (1) thing the jury would probably find he was lying about everything else. (R. 677, ll. 13-25).

In his testimony, Prather also did not tell the jury about leaving the hospital altogether and leaving Phillips alone with the nurses. (R. 651-731). However, an E.R. nurse testified Prather left the hospital and she searched for him including looking for his car in the parking lot with Phillips. They were unable to locate Prather or his car. This is important because this

would have given Prather another opportunity to see what was in the front floorboard of his own car.

Prather was also impeached regarding his statement to the nurse at the hospital. Again, a completely disinterested witness [this time a nurse] took contemporaneous notes of her conversation with Prather in which he stated that after assaulting the victim, the victim was alive but just barely. Prather denied on the stand he ever made this statement to the nurse. (R. 718, ll. 9-14 & 729, ll. 5-10). Prather also denied he told the nurse that he would probably go to jail for this and other statements testified to by the nurse and police officers. (R. 715, 718-19, 729, ll. 5-10).

Prather also denied telling Detective Edwards in his first initial comment that he and Phillips went straight to the hospital, leaving out the trip to the pool hall. (R. 718-19).

Prather was also impeached with his prior testimony in 2009 where he testified Phillips did not want to go to the hospital and Phillips stated that he was fine. (R. 719, ll. 12-17). And, Prather was impeached with the fact the police department was close to the victim's residence, but he and Phillips did not go to the police department but ended up at a pool hall. (R. 720, ln. 4 – p. 721, ln. 24).

Additionally, Prather admitted to medical personnel and to police he hit the victim with devastating blows and the victim was alive but just barely. This directly contradicts Prather's trial testimony in which he asserted he hit the victim two (2) or three (3) times. Prather testified two (2) of the blows were struck as he was on his tip toes. The last or third (3rd) blow was as the victim was falling to the floor. Prather testified at trial that when he left the home the victim was clearly alive, **not** just barely. Further, at the hospital Prather stated he needed to wash the

blood off of his hands. And, Prather had blood on the back of his shirt and on his socks. This is inconsistent with his trial testimony regarding the number of times he hit the victim and the severity of those blows.

Additionally, Prather's trial testimony is inconsistent with *his statement to police* that after the altercation with the victim, he and Phillips immediately left the residence **and Phillips did not re-enter the residence**. (R. 601-06). Prather admitted on cross-examination he never told police Phillips re-entered the residence. He never told police about Phillips staying in the house 8 to 10 minutes. He admitted this was an important and critical fact he left out of his statement to police. (R. 715-16).

Prather was also impeached with the fact that he never informed Detective Edwards that Phillips assaulted the victim before they left the house. (R. 709, ln. 10 – 712, ln. 14). At trial, Prather claimed Phillips kicked and hit Gerald Stewart in the living room of the home before the two (2) left the house together. Detective Edwards testified Prather told him after he got Phillips out of the victim's bedroom, the victim grabbed Prather by the arm and Prather pushed the victim and hit the victim as he was falling. Prather did not state Phillips attacked the victim. (R. 602-603, 608-09).

Prather was also forced to admit, with some difficulty and reluctance, that the word "rapist" was carved into the victim's buttocks and it was spelled correctly. (R. 723-24). The State introduced the fact that Prather's co-defendant misspelled the word "rapist" 2 times in talking to police. And, a knife was found in Prather's car after the murder.

Prather was also impeached with the fact that at no time did he or Phillips call 911 or police after the alleged sexual assault. They did not call 911 from the victim's residence. (R.

722). They did not call 911 from Phillips' brother's residence when they stopped there after the incident. (R. 722). They did not call 911 from Calloway's Bar [the pool hall]. (R. 722).

Prather was also impeached with the fact that after the murder he and Phillips just happened to end up at Calloway's Bar [pool hall] almost by accident. This is the same pool hall where Prather met the victim before the murder. (R. 721, 652).

And, Prather was impeached with the fact he never told any police officer that he and Phillips went to Woodbine Apartments after the murder. (R. 721, ln. 25 – 722, ln. 5). Officer Edwards testified Prather never informed him that he and Phillips went to Woodbine Apartments after the murder. (R. 596-611).

The majority also overlooks the fact that upon his arrest Prather was found in possession of a pack of cigarettes and a cigarette lighter. (R. 441). The victim was found dead with a cigarette burn to the middle right finger of his hand and a cigarette butt on his right shoulder. This is mentioned nowhere in the majority's recitation of the facts or its Opinion, including the harmless error analysis. Prather also admitted during cross-examination he had given someone a cigarette that night. (R. 693, ll. 1-7).

In summary, Prather was impeached the proverbial five (5) ways to Sunday. Including denying making specific incriminating statements to police and medical personnel, Prather admitted he left out critical and important facts in the statement he did give police, including that Phillips re-entered the residence and remained in the residence for 8 to 10 minutes before exiting with items stolen from the victim's home. Further, Prather's testimony was impeached in several other different ways. As a result, Prather's trial testimony was impeached and his credibility completely undermined and LaRosa's testimony was harmless beyond a reasonable doubt.

Farrow, *supra*. Since the majority misapprehended or overlooked these facts within the Record, the Petition for Rehearing or Rehearing En Banc must be granted.

9. **HARMLESS ERROR**: The majority also misapprehends or overlooked that it placed undue reliance in its harmless error analysis on the fact Prather's first trial ended in a mistrial. The entire Record of Prather's first trial was not before this Court, only a portion of the Appellant's testimony. It is unknown what the jury count was or why that jury did not convict. The trial was prosecuted by two different prosecutors. This Court accepted appellate counsel's assertion in her brief that only two (2) new pieces of evidence were introduced in this trial. (Opinion). This was erroneous. Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997)(Where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument may not be considered by the Court where it is unsupported by the record. This Court must grant the Petition for Rehearing or Rehearing En Banc.

10. **HARMLESS ERROR AND RELIABILITY PRESERVATION**: The majority completely overlooked and misapprehended the appellate court record and Respondent's argument that the reliability of LaRosa's non-scientific testimony was not preserved for appellate review. The majority points out in a footnote that Prather contended on appeal that LaRosa's expert testimony was not sufficiently reliable under State v. White, 382 S.C. 265, 675 S.E.2d 684 (2009). (Opinion, n. 5). The majority overlooks that this issue was not preserved for appellate review, and the majority did not address the preservation issue. At the time the evidence was introduced, Prather objected to the expert's testimony because it was not proper reply, it was not scientific, he was not qualified to testify as an expert, and the testimony invaded the province of the jury. Prather did not object to the testimony violating his right to due process, **or** that the

testimony was unreliable non-scientific testimony, the basis on which it was offered. As a result, these two (2) issues were not preserved for appellate review. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998)(constitutional arguments must be raised to be preserved); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000)(same); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)(a new trial motion may not be used to raise an evidentiary issue for the first time); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), *citing* State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996). As a result, the assertion that LaRosa's testimony was not sufficiently reliable non-scientific expert testimony was not preserved for appellate review. State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)(a new trial motion may not be used to raise an evidentiary issue for the first time); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), *citing* State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996). The Petition for Rehearing or Rehearing En Banc must be granted.

11. **HARMLESS ERROR AND RELIABILITY:** The majority also overlooked or misapprehended the appellate court record and Respondent's arguments that Judge Newman appropriately determined LaRosa's testimony was sufficient reliable to be admitted. The majority incorrectly found in the same footnote, "we find expert testimony that speculates on the motives and mindset of a perpetrator to be suspect, particularly when based on crime scene photographs, instead of viewing the crime scene in person, 'some' of a co-defendant's prior statements, and none of the mental health histories of the parties." (Opinion at n. 5).[7]

[7] Respondent is not quite sure what this finding means. First, the Court only finds the testimony "suspect" not unreliable under Rule 702. Further, at the end of the majority's Opinion, in another footnote, the majority states: "Because our resolution of the prior issue [whether the testimony was proper Reply and not harmless] is dispositive, we decline to address the remaining issues on appeal. *See* Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518

First, LaRosa testified he viewed not only the crime scene photographs, but also the crime scene video. Crime scene photographs and crime scene videotapes are taken for the very purpose of preserving the crime scene as it was. He also reviewed the reports of the first responder's regarding the positioning of the victim's body. He also reviewed the autopsy photographs and the autopsy report of the pathologist. He also was provided a copy of the transcript of the prior trial, and was present during Prather's testimony. (R. 732-774).

As LaRosa was not involved in the initial processing of the crime-scene or the investigation leading to Prather and Phillips' arrest, he would not have viewed the crime scene at the time of the crime. He was only consulted prior to this trial. This is true of many experts, including defense' experts and civil experts called at trial in civil cases. To accept the majority's reasoning, the defense could never call an expert except one (1) who actually viewed the crime scene at the time the body was present, which would mean never. Nor could civil attorneys call an accident reconstruction expert, a human factors expert, or any other similar expert retained after litigation had begun. That is simply not the law nor has it ever been.

The simple fact is experts are allowed to form their opinion based on reviewing the exact type of materials LaRosa reviewed in forming his opinion. They do not have to view the crime scene at the time the body is present. Similarly, an accident reconstruction expert does not have to actually view a fatal accident scene when the body or bodies of the deceased are still present. Otherwise, many experts would never be allowed to testify at trial. The expert, LaRosa, testified he based his opinion on what was found in the crime scene based on the crime scene photographs, the autopsy photographs, the pathologist report, and the crime scene video-tape and his years of experience and training as a crime scene analyst. There is no dispute the crime scene

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S.E.2d 591, 598 (1999)(ruling an appellate court need not address remaining issues when its resolution of a pri9or issue is dispositive)." (Opinion, p. 24, & n. 6).

photographs, autopsy photographs, and the crime scene video-tape accurately depicted the crime scene and what was found there and the victim's body. The majority's reasoning is erroneous because it overlooked or misapprehended these facts in the record. The Petition for Rehearing or Rehearing En Banc must be granted.

12. **HARMLESS ERROR AND QUALIFICATIONS**: Further, the majority overlooked and misapprehended the appellate court record and Respondent's argument since it did not engage in the required analysis under State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) and State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). The majority, in its footnote, merely notes that Prather contended LaRosa's expert testimony was not sufficiently reliable under White. (Opinion, at n. 5).

The State proffered LaRosa's qualifications and testimony *in camera* for Judge Newman's determination of its admissibility pursuant to White, 382 S.C. 265, 676 S.E.2d 684 and Tapp, 398 S.C. 376, 728 S.E.2d 468. **(R. 731-55).**

The State established the following regarding the knowledge, skill, experience, training, and education of LaRosa as it relates to crime scene analysis: He had been employed by the State Law Enforcement Division for 18 years; from 1994-2000 as a Special Agent in the crime scene unit collecting and processing evidence, and analyzing and reconstructing crime scenes based on the evidence; from 2005-10 as a violent crimes investigator; and from 2010-12 as a behavioral analyst assigned to the behavioral science unit. As a behavioral analyst, he studied under and is currently working with 2 qualified crime scene analysists at SLED. He interned with the Dept. of Mental Health under a forensic psychiatrist and psychologist being treated as a peer; completed rounds at psychiatric hospitals; and gave assessments on those individuals. He completed a 2 month internship with the FBI working cases and completing crime scene analysis

and profiles alongside FBI personnel. Specifically, he had an active caseload, worked independently, and FBI personnel peer reviewed his work. He had previously been qualified as an expert and testified in federal and state court in crime scene, crime scene reconstruction, and crime scene assessment. In being qualified as an expert in crime scene analysis in this case, LaRosa testified he would combine forensics, crime scene reconstruction, and the psychology and behavior exhibited at the crime scene to give an opinion as to the number of offenders involved in the crime. He reviewed the crime scene photographs and video, the reports of first responders regarding how they found the victim's body, the autopsy photos, the pathologists report, and he was present for the testimony of Prather in this trial. (R. 731-51).

LaRosa testified he found evidence of "staging." He explained "staging" is a term used in crime scene assessment and reconstruction[8] indicating the person who committed the crime altered the crime scene in order to misdirect law enforcement and hide the truth. He opined the carving of the word "rapist" into the victim's back was evidence of staging. The superficial nature of the carvings supported his belief the scene was staged as compared to directed or real anger he would expect to see from an actual rape. The lack of evidence of real anger, such as deeper carvings, or anger directed towards the instrument of the rape, such as injury to the penis or mouth supported his opinion of staging. Additionally, staging was also evidenced in the positioning of the body and in the placement of a dildo beside the victim's body; the victim was found on his knees face down on the sofa; there was no sign or evidence the dildo was used in any manner or had anything to do with the murder. The staging in this case indicated the personality in the crime scene at the time wanted to misdirect law enforcement towards the idea the victim was a rapist. LaRosa further opined the crime-scene showed evidence of "undoing."

[8] *See* State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

"Undoing" is a symbolic message from the offender that he wants to cover up the crime or erase what has happened. Evidence of undoing was present in this case by the victim being covered up by a blanket and pillow, and this was a classic case of "undoing." "Staging" and "undoing" are 2 completely distinct and conflicting emotions. Based on his review of the evidence and Prather's testimony, he concluded 2 offenders were at the scene at the time of the crime. In addition, in accordance with SLED policy and prior to testifying, LaRosa submitted the evidence from this case to his colleagues for peer review, and they shared his opinion on this matter. (R. 734-51).

At the conclusion of the hearing, Judge Newman found LaRosa was qualified to testify as an expert in crime scene analysis based on his experience and training, *and* his testimony was relevant, reliable, and admissible **pursuant to the requirements of Rule 702, SCRE, and Tapp. (R. 752-55).** As a result, the State introduced the testimony. (R. 755-74).

Expert crime scene staging testimony is not actual scientific testimony at all, but expert *opinion* testimony—not subject to the various heightened *scientific* expert testimony standards. *See* State v. Essa, 194 Ohio App.3d 208, 955 N.E.2d 429 (Ct. App. 8th D. 2011)(Testimony was proper since agent did not offer any opinions concerning *defendant's* possible motives or any opinions as to whether he believed *defendant* had staged wife's death); State v. Patton, 280 Kan. 146, 120 P.3d 760 (2005)(since testimony "was based on specialized knowledge that would not be familiar to a lay person . . . [and was] developed from inductive reasoning based on the expert's own experiences, observations, or research," it was "was pure opinion as it related to the staging of a crime scene [and] not subject to Frye."); Simmons v. State, 797 So.2d 1134 (Ct. Crim. App. Ala. 1999)(crime-scene analysis does not rest on scientific principles like those contemplated in Frye; this field constitutes specialized knowledge. "[T]he evidence offered through Neer's testimony was not 'profile' testimony" since "Neer's testimony concentrated on

his opinion of what the crime scene and the physical condition of M.A.'s body suggested happened during the murder" and "Neer's testimony did not accuse Simmons of committing the crime."); *see also* United States v. Meeks, 35 M.J. 64 (Ct. Mili. App. 1992)("Crime scene analysis, that is, gathering an analysis of physical evidence, is generally recognized as a body of specialized knowledge, for purposes of rules regarding admissibility of expert witness testimony," and "The proper standard for determining the admissibility of expert witness testimony is helpfulness to the members, rather than absolute necessity." Further, "[t]he mere fact that expert witness' homicide crime scene analysis supported prosecution's case against the accused did not make the evidence unduly prejudicial, particularly as witness did not directly opine concerning accused's guilt, but instead offered his opinion concerning generic characteristics of the perpetrator derived from the evidence at the crime scene."); State v. Swope, 315 Wis.2d 120, 762 N.W2d 725 (Ct. App. 2008) ("Expert testimony of FBI agent about death-scene analysis . . . would assist the jury at a trial . . . agent's testimony included a conclusion that there was staging at the crime scene that was consistent with homicide, and it was beyond the everyday knowledge of an average jury to recognize evidence of staging or to understand the implications of such evidence."); People v. Jackson, 221 Cal.App.4th 1222, 165 Cal.Rptr.3d 70 (Ct. App. Cal. 2nd D. 2013)(the admission of crime scene expert opinion testimony was not error; including expert testimony in his opinion the perpetrator was alone and was someone victim knew.).[9] Prather's contention LaRosa's testimony was

[9] Crime scene analysis, which involves the gathering and analysis of physical evidence, is generally recognized as a body of specialized knowledge. *See generally* 2 Wigmore, *Evidence*, Section 417b at 499 (1979); State v. Russell, 125 Wash.2d 24, 882 P.2d 747 (1994); Meeks, *supra*; Nolan, *supra*, Hill v. State, 647 S.W.2d 306 (Tex. App. 1982).

"unscientific" is completely correct; and it is this point which is fatal for Prather's argument.[10]

> Rule 702, SCRE, governs testimony of an expert. Specifically, Rule 702, SCRE, states:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"This language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)(holding a dog handler met the requirements of Rule 702, SCRE, based on experience and training).

Judge Newman, following White and Tapp, and acting as the required gatekeeper of non-scientific expert witness' testimony, conducted an *in camera* hearing and after hearing the proffered testimony and cross-examination of LaRosa, made the required findings regarding the expert's qualifications, the relevancy of the testimony, the "threshold reliability" of the proffered testimony, and that it would be helpful to the jury. **(R. 752-54).** *See* White, 382 S.C. at 270, 676 S.E.2d 684; Tapp, *supra*.

Agent LaRosa's qualifications were adequately developed; and, based on his knowledge, skill, experience, training, and education, he was properly qualified to offer an expert opinion in crime scene analysis. **(R. 732-51).** Specifically, based on his experience and training, LaRosa provided testimony regarding staging, directed anger, undoing, and the number of personalities present given the physical evidence and distinct emotions shown, and, thus, the number of offenders present. (R. 732-51).

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[10] As Judge Newman correctly pointed out in his **Order Denying the Motion for a New Trial,** both the State and Prather agreed, and he found, the testimony offered by LaRosa was non-scientific in nature. (R. 982, Order Denying Motion for a New Trial, p. 12).

This Court should have next turned its attention to the reliability of the non-scientific testimony offered. *See* White. at 273-74, 676 S.E.2d at 688. "The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating non-scientific expert testimony." Id. at 274, 676 S.E.2d 688; Council, 335 S.C. 1, 515 S.E.2d 508. The Supreme Court offers "no formulaic approach" to addressing Rule 702, SCRE, "reliability challenges that could arise with respect to nonscientific expert evidence." White, 382 S.C. at 274, 676 S.E.2 at 688.

In this case, LaRosa **did not offer profile evidence** [as Prather spent a large portion of his brief arguing] or **evidence of victimology**. Importantly, LaRosa did not offer an opinion as to who the killer was or what role the defendant played, if any, in the murder. Prather did not dispute below the concepts of "staging" and "undoing" were reliable and accepted concepts. He also did not object to LaRosa's opinion the "staging" and "undoing" showed two (2) distinct emotions. However, he did object to LaRosa's opinion that multiple actors were present at the crime scene.

LaRosa's *in camera* testimony demonstrated the reliability of the proffered testimony. His prior work had been peer reviewed at the F.B.I. His work in this case had also been peer reviewed by 2 other crime scene analysts he works with at SLED, and they concurred with his findings. He also explained to Judge Newman what crime scene analysis is. His testimony supports the conclusion of the general acceptance of crime scene analysis. **(R. 732-51).**

The evidence was also relevant. Relevant evidence is "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, 401, SCRE. It cannot be

seriously contended LaRosa's expertise in the area of crime scene analysis *and* his testimony in this case did not meet this criteria. LaRosa's testimony showed: (1) the crime scene was staged to misdirect police that the victim was a rapist, which contradicted Prather's trial testimony that the victim had sexually assaulted Phillips; (2) the staging was undone by someone; and (3) there were 2 different persons or personalities involved in the murder, i.e. 1 who staged the crime scene and 1 who undid or covered up the staging, which is also contrary to Prather's trial testimony.[11] [See previous discussion above].

Finally, the testimony was certainly helpful or would assist the jury. "A homicide and its crime scene, after all, are not matters likely to be within the knowledge of an average [trier of fact.]" Simmons v. State, 797 So.2d 1134, 1156 (Ala. Crim. App. 1999) *quoting* United States v. deSoto, 885 F.2d 354, 359 (7th Cir. 1989). In light of the grotesqueness of the crime scene, and the condition of the victim's body, Judge Newman did not err in admitting the expert testimony because the jury would be greatly assisted by a professional analysis of the crime scene in comparison to other murder cases in light of Prather's claim at trial. Expert testimony on this subject was reasonably likely to assist the jury in understanding and assessing the evidence, in that the matter at issue was highly material, and beyond the realm of "acquired" knowledge normally possessed by lay jurors. Simmons, 797 So.2d at 1156-57; Meeks, *supra* at 68-69 ("A homicide and its crime scene, after all, are not matters likely to be within the knowledge of an average" juror).

[11] Prather's argument overlooks that similar testimony in the area of crime scene analysis, was used to overturn the conviction and death sentence for a capital inmate in State v. Spann, 334 S.C. 618, 621-22, 513 S.E.2 98, 100 (1999). Basic principles of fairness call for the prosecution to be able to introduce similar evidence under same evidentiary rules to show the jury the truth, i.e. that the defendant's version of what occurred is false.

Judge Newman found below that "staging" and "undoing" are basic concepts of crime scene reconstruction and assessment, both areas to which LaRosa testified previously as an expert. Judge Newman also found as reliable that 2 distinct, separate, and opposing emotions are shown in "staging" and "undoing." Finally, Judge Newman found LaRosa's opinion multiple actors were present at the death scene was reliable, and was consistent with logic and common sense in light of the testimony of the defendant Prather. Judge Newman's findings are fully supported by the record, including the statements of Prather to the hospital nurse and police, the testimony of Ron Rabon, and the evidence at the crime scene. This Court incorrectly determined LaRosa's testimony was "suspect" as it overlooked Judge Newman's findings of fact and conclusions of law are fully supported by the Record. Further, there is evidence in the record supporting Judge Newman's determination pursuant to White and Tapp so there could be no abuse of discretion.

Finally, Prather argued LaRosa's testimony improperly invaded the province of the jury as fact finder. This is clearly not accurate. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. "[S]o 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." State v. Commander, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011).

LaRosa's testimony plainly did not enter the province of the jury since at no point did LaRosa "opine on the criminal defendant's [Prather's] state of mind or guilt or testify on matters of law . . ." Id. (emphasis added). He merely opined on the personality of whoever may have committed the crime, staged, and undid the crime. He offered no testimony as to whether, in his

opinion, Prather had this criminal state of mind or had committed the crime. LaRosa's testimony revolved around the limited issue of, based on the staging of the crime scene, and undoing, how many perpetrators were active in the crime scene. At no time did he advise the jury to find Prather guilty and in fact made no mention of Prather or the governing law of the case. Therefore, Prather's argument regarding the expert testimony is clearly without merit, and Judge Newman did not abuse his discretion in admitting this testimony.

13. **ANTICIPATION OF EVIDENCE**: This majority also misapprehended and overlooked the record and Respondent's arguments and erroneously reversed Prather's convictions and sentences based on a finding that Prather could not have anticipated LaRosa's testimony. (Opinion, at p. 22). The majority seems to read into the law the requirement that a defendant must be able to anticipate Reply or Rebuttal testimony before it can be offered by the State. Based on Respondent's review of the relevant case law, Respondent can find no case imposing such requirement. A defendant has no right, much less a constitutional right, to fashion his trial testimony based on the discovery in the case, and prevent the State from calling a qualified reply or rebuttal witness who may demonstrate or prove the defendant is not telling the truth. *See* State v. Garris, 394 S.C. 336, 350-51, 714 S.E.2d 888, 896 (Ct. App. 2011). *See also* Harris v. New York, 401 U.S. 222, 225 (1971)(prosecution is entitled to rebut false impression defendant created by his own testimony); United States v. Leavis, 853 F.2d 215 (1988)(same). The Petition for Rehearing or Rehearing En Banc must be granted.

14. **SUMMARY:** Respondent suggests the Petition for Rehearing En Banc should be granted because the cases the majority cites in its Opinion are supportive of Respondent's arguments, not the reverse. Especially, in light of Prather's concession in his brief that LaRosa's testimony directly contradicted is trial testimony (FBOA, p. 11) and the appellate court record.

As a result, the Opinion in the present case, a published Opinion, would contradict prior holdings of this Court and the South Carolina Supreme Court. Consideration by the full Court is necessary to secure or maintain uniformity of its decisions, or when the proceeding involves a question of exceptional importance. Rule 219(a)&(b), SCACR. *See e.g.* Davenport v. Cotton Hope Plantation Horizontal Property Regime, 325 S.C. 507, 482 S.E.2d 569 (1997), *aff'd as modified*, 333 SC. 71, 508 S.E.2d 565 (1998).

CONCLUSION

For the above stated reasons, the Petition for Rehearing or Suggested Rehearing En Banc must be granted.

Respectfully submitted,

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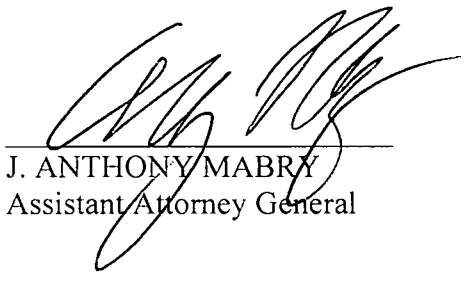

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September 21, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Respondent,

vs.

ROBERT JARED PRATHER,

Appellant.

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***State's Petition for Rehearing and Suggestion for Rehearing En Banc and Memorandum of Law in Support Thereof*** in the foregoing action by depositing two copies of same in the United States Mail to Elizabeth Franklin-Best, Esquire, Blume Franklin-Best & Young LLC, 900 Elmwood Avenue, Suite 200, Columbia, South Carolina 29201 this 21st day of September, 2017.

ANTHONY MABRY
Senior Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

September 21, 2017

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

Re: The State v. Robert Jared Prather
Appellate Case No. 2014-001500

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the State's Petition for Rehearing and Suggestion for Rehearing En Banc and Memorandum of Law in Support Thereof in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Senior Assistant Attorney General

/lbb
Enclosure

cc: Elizabeth Franklin-Best, Esquire
S. R. Hubbard, III, Solicitor
Trisha Allen, Victim Advocacy Division