

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lexington County  
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

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SC Court of Appeals

THE STATE,

Petitioner,

vs.

ROBERT JARED PRATHER,

Respondent.

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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 as to this Court' substituted Opinion issued **December 6, 2017**.<sup>1</sup>

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 State filed a Petition for Rehearing and Suggestion for Rehearing En Banc. According to this Court's Order filed December 6, 2017, this Court granted the Petition for Rehearing, dispensed with further briefing and argument, and substituted the attached Opinion for the previous opinion which was withdrawn. (Order, December 6, 2017)(See also State v. Prather, Opinion No. 5514 (Ct. App. Refiled December 6, 2017). The substituted Opinion did not substantially change the majority's original opinion except to remove a footnote

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<sup>1</sup> The State previously filed a Petition for Rehearing and Suggestion for Rehearing En Banc as to the majority's Opinion in State v. Prather, Opinion No. 5514 (Ct. App. Filed Sept. 6, 2017). On December 6, 2017, the majority of this Court entered an Order granting that Petition for Rehearing, dispensing with further briefing and argument, and attached an Opinion which was substituted for the previous Opinion, which was withdrawn. The dissent, Judge Williams, agreed to the grant of rehearing, and in light of the majority's substituted Opinion, adhered to his dissent which was withdrawn and substituted. In the majority's substituted Opinion, it did not substantially change its ruling. As a result, since the majority granted the Petition for Rehearing, but did not substantially change its Opinion, and still reversed Prather's convictions and sentences, Respondent believes for the reasons stated herein this Petition for Rehearing and Suggestion for Rehearing En Banc should be granted; and, further, out of an abundance of caution, Respondent files this Petition for Rehearing and Suggestion for Rehearing En Banc to preserve all issues and arguments raised to the Court of Appeals because Respondent will file a Petition for Writ of Certiorari in the South Carolina Supreme Court to review the majority's substituted Opinion in this case.

referencing testimony from a previous mistrial which the majority erroneously relied upon to support its holding. The majority's revised or substituted Opinion of December 6, 2017 misapprehends or overlooks the appellate court record or misapprehends or overlooks Respondent's arguments; and, therefore, this Petition for Rehearing and Suggested Rehearing En Banc must be granted for several reasons.

1. **THE MAJORITY MISAPPREHENDED THE RECORD:** Respondent submits that the majority in its revised or substituted Opinion 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 conceded in his brief before this Court 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 in its revised or substituted Opinion. 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. This concession was also pointed out to this Court in Respondent's original Petition for Rehearing and Suggested Rehearing En Banc. The majority completely overlooked this concession [part of the Appellate Court Record] in its revised or substituted 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).<sup>2</sup>

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). 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).

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<sup>2</sup> *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).

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 Stewart’s 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).

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).<sup>3</sup> This was also set forth in Respondent's brief. (**FBOR, pp. 14-15**). This was also pointed out in Respondent's original Petition for Rehearing and Suggested Rehearing En Banc.

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

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<sup>3</sup> 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).

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. 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.<sup>4</sup> 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 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

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<sup>4</sup> 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 of the original Opinion).

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.

5. 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.<sup>5</sup> 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 examining the crime-scene photographs, the autopsy photographs, and the crime scene videotape, 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

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<sup>5</sup> As shown above, there was also significant testimony about the crime scene brought out through cross-examination of Prather.

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.

6. **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, that its reasoning is inconsistent. 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.<sup>6</sup> The majority noted LaRosa testified at least two (2) individuals were involved in the crime scene. The majority pointed out in a footnote that Phillips and Rabon were still inside the home when Prather was outside in the car. The majority asserted this shows the testimony was not proper Reply because it did not directly contradict Prather's testimony. (Opinion).

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

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<sup>6</sup> 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).

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. If LaRosa's testimony contradicted Prather's testimony at trial, then it is proper Reply testimony. Todd, supra.; 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 earlier in its Opinion, 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 later in its Opinion, then the testimony clearly contradicted Prather's trial testimony that he was not involved in the crime or the crime scene. (See FBOA, p. 11).

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.

**7. 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 *false 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 up to 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 (1<sup>st</sup>) 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.<sup>7</sup> 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

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<sup>7</sup> Respondent would note the fact Rabon testified that Prather and the victim left the residence after the consensual sexual encounter between the victim and Phillips was left out of the majority’s substituted Opinion.

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 20<sup>th</sup>, the day before the murder. (R. 681, ll. 5-14). However, Rabon testified Prather was at the victim's residence on the 20<sup>th</sup>, 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 (3<sup>rd</sup>) 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, 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, the dissent is correct. 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.

**8. 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.<sup>8</sup> This Court must grant the Petition for Rehearing or Rehearing En Banc.

9. **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). 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,

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<sup>8</sup> The majority also accepted this assertion in Prather's brief but ignored Prather's concession in the same brief that LaRosa's Reply testimony contradicted and impeached Prather's trial testimony. (FBOA, p. 11).

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.

10. **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 a 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).<sup>9</sup>

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

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<sup>9</sup> Respondent is not quite sure what this finding means. First, the Court only finds the testimony "suspect" not unreliable under Rule 702. Further, in the same 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 S.E.2d 591, 598 (1999)(ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive)." (Opinion, n. 5).

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 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.

11. **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).

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 analysts 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<sup>10</sup> 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." "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

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<sup>10</sup> See State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

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.).<sup>11</sup> Prather’s contention LaRosa’s testimony was “unscientific” is completely correct; and it is this point which is fatal for Prather’s argument.<sup>12</sup>

Rule 702, SCRE, governs testimony of an expert. Specifically, Rule 702, SCRE, states:

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<sup>11</sup> 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).

<sup>12</sup> 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).

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).

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. [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 (7<sup>th</sup> 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).

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.

12. **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. The majority seems to read into the law a 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 a requirement. The cases cited by the majority simply hold that when Reply is limited to issues raised by the defense, the element of surprise is eliminated when Reply is properly restricted. *See McGaha v. Mosley*, 283 S.C. 268, 277, 322 S.E.2d 61, 466 (Ct. App. 1984)("Since reply testimony is limited to issues raised by the defense, the element of surprise is eliminated when reply is properly restricted."); *State v. Durden*, 264 S.C. 86, 90, 212 S.E.2d 587, 589 (1975)(finding "reply testimony did not go beyond refutation of that which the appellant's witnesses asserted[,] and therefore it could "hardly be argued that the appellant's counsel was taken by surprise"). 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).<sup>13</sup> *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 (4<sup>th</sup> Cir. 1988)(same). LaRosa's Reply testimony was limited to and did not go beyond that necessary to contradict and impeach Prather's trial testimony. (See FBOA, p. 11). The Petition for Rehearing or Rehearing En Banc must be granted.

13. **SUMMARY:** Respondent suggests the Petition for Rehearing and Suggested Rehearing En Banc should be granted because the cases the majority cites in its substituted Opinion are supportive of Respondent's arguments, not the reverse. Especially, in light of

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<sup>13</sup> See the majority's discussion of *Garris* and its holding in the substituted Opinion on this case. (substituted Opinion, pp. 7-8).

Prather's concession in his brief that LaRosa's testimony directly contradicted and impeached his trial testimony (FBOA, p. 11) and the appellate court record. As a result, the substituted 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 as to the substituted Opinion must be granted.

Respectfully submitted,


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December 21, 2017

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lexington County  
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

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THE STATE,

Petitioner,

vs.

ROBERT JARED PRATHER,

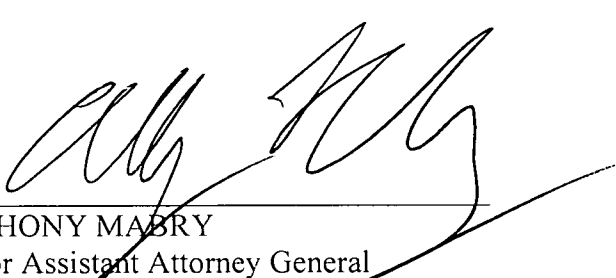
Respondent.

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CERTIFICATE OF SERVICE

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I, **Anthony Mabry**, hereby certify that I have serve 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 21<sup>st</sup> day of December, 2017.

  
\_\_\_\_\_  
ANTHONY MABRY  
Senior Assistant Attorney General

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Robert Jared Prather, Appellant.

Appellate Case No. 2014-001500

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Appeal From Lexington County  
Clifton Newman, Circuit Court Judge

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Opinion No. 5514  
Heard April 11, 2017 – Filed September 6, 2017  
Withdrawn, Substituted, and Refiled December 6, 2017

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**REVERSED AND REMANDED**

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Elizabeth Anne Franklin-Best, of Blume Norris &  
Franklin-Best, LLC, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General W. Jeffrey Young, Deputy Attorney  
General Donald J. Zelenka, and Assistant Attorney  
General J. Anthony Mabry, all of Columbia; and  
Solicitor Samuel R. Hubbard, III, of Lexington, for  
Respondent.

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**KONDUROS, J.:** In this criminal case, Robert Jared Prather appeals his convictions of murder and armed robbery, arguing (1) the State's expert witness's testimony was not proper rebuttal testimony, not scientifically valid, and invaded the province of the jury; (2) the expert's testimony was not properly produced

during discovery; (3) the State "sandbagged" the defense with the expert's rebuttal testimony; (4) Prather's codefendant's statement was inadmissible hearsay and violated Prather's Confrontation Clause rights; (5) the trial court erred in denying Prather's motion for a directed verdict; (6) the State's actions in pursuing factually inconsistent theories in Prather's and his codefendant's cases denied Prather's right to due process; (7) the trial court denied Prather due process because it did not allow him to introduce a statement made by an unavailable witness; and (8) the trial court violated Prather's Fourth Amendment rights because it did not suppress evidence produced as the result of a fatally defective warrant. We reverse and remand.

## **FACTS**

A grand jury indicted Prather for the murder of Gerald Stewart (Victim), armed robbery, and first-degree burglary.<sup>1</sup> Prather was originally tried in October of 2009, but that trial resulted in a hung jury. At the second trial, Officer Ronald Suber testified he went to the hospital on April 22, 2005 in response to a sexual abuse claim involving a male victim. Officer Suber indicated Prather told him that he, Phillips, and Victim were drinking at Victim's residence and Phillips passed out on the couch. Officer Suber explained Prather stated he left the residence and when he returned, Victim answered the door completely nude. According to Officer Suber, Prather claimed Victim asked him if he knew Phillips "likes to have his dick sucked." Officer Suber said Prather explained he pushed his way past Victim and found Phillips in a bedroom "wearing nothing but his boxer shorts and asleep on the bed." Officer Suber testified Prather said, "I beat the shit out of [Victim] and those were devastating blows." Officer Wayne Kleckley testified Prather also told him "he beat up" Victim. Officer Suber transported Prather to the police station for "investigative purposes" after he learned Victim was dead.

Donna Sharpe, a nurse, testified Phillips told her all he remembered was waking up in his boxers. Sharpe stated Prather admitted he beat Victim and he was "probably still laying there." Sharpe explained Prather asked her if he could wash his hands because he hated getting blood on them and he laughed. Sharpe testified Prather asked, "I'll probably go to jail for this, won't I?" Sharpe asked if he meant for beating Victim, and Prather replied "yes, I beat him. But he's alive though, maybe barely though."

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<sup>1</sup> Prather's codefendant, Joshua Phillips, was also indicted for these charges, but he accepted a deal with the State to plead guilty to armed robbery and voluntary manslaughter.

Officer Brandon Field testified he was dispatched to check on Victim at his residence at approximately 5:30 a.m. on April 22, 2005. Officer Field explained he found Victim dead "underneath a blanket, kind of on [his] knees, knelt down, like face-down on the couch." Virginia Youmans, a medical technician, testified Victim had "what appeared to be markings or carvings more or less on the small of [his] back or the lower back area where you[r] pants and shirt would meet." Youmans stated the word carved was "rapist." Officer Al Stuckey stated he discovered an adult sex toy, a dildo, underneath Victim's armpit at the crime scene.

Dr. Janice Ross, a pathologist, testified Victim suffered bruising around his eye, scalp, and lips; a fractured nose and ribs; scratch marks on his thigh and buttocks; and a burn mark on his finger, which was likely from a cigarette. She stated Victim's blood test revealed 0.279 percent alcohol and Valium in his system. Dr. Ross believed Victim's death was caused by an irregular heartbeat, due to the stress of a beating and his enlarged heart. She opined a healthier person could have survived the beating. Dr. Ross explained she could not rule out suffocation as a contributing cause because of the position of Victim's body.

Ronald Rabon testified he was Victim's roommate. He had moved in approximately a week before the incident after having met Victim in an alcohol rehabilitation facility. Rabon testified he had only recently discovered Victim was a homosexual, and he planned to move out. He stated he returned from work the day of the incident and Prather and Phillips were drinking with Victim at his residence. Rabon was in and out of his room throughout the evening, also drinking, and he testified he saw Phillips hit Victim twice and bust Victim's lip. Victim fell onto a chair, and Prather and Rabon told Phillips to stop. Rabon testified he, Prather, and Phillips left the residence to buy cocaine. Rabon explained that after they returned, Prather left again. Rabon claimed he went to his bedroom and when he emerged he observed Phillips and Victim in activity of a "sexual nature." He later observed Phillips and Victim on Victim's bed. Rabon later heard Prather yelling for Phillips. Rabon testified he went to sleep and woke up "with about four cops standing over me."<sup>2</sup>

Prather took the stand in his defense. He testified he and Phillips had spent the afternoon at Victim's house drinking and hanging out. Prather indicated that at one point, Victim and Phillips got into a fight outside the residence. Prather stated the

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<sup>2</sup> Rabon testified he is half-deaf in one ear and sleeps very soundly if he falls asleep on that side.

fight broke up, but when they came back inside Phillips hit Victim twice again until Rabon and Prather told him to stop. The parties were in and out throughout the afternoon and evening replenishing alcohol and cigarettes. Finally, Prather claimed he left Victim's residence to buy cocaine. When he returned, Victim "came out [of] the bedroom completely naked with an erection" and told him Phillips "liked his dick sucked." Prather stated he wanted to take Phillips home but Victim told him "you're not going any fucking where." Prather testified he hit Victim three times because Victim grabbed his arm and he wanted to get away. Prather stated he "jumped up and went to the bedroom door" and found Phillips "in his bed in his boxers." Prather claimed "there was a dildo on the bed by [Phillips]'s feet." Prather testified he and Phillips went to the living room and Phillips "was screaming and upset and kicking" Victim. Prather claimed that as they were leaving, Phillips went back inside to get his shoes and Prather waited in his vehicle for about ten minutes. Prather testified Victim was still alive when he left. Prather explained he and Phillips eventually went to the hospital, where Prather told hospital staff Victim had raped Phillips.

On cross-examination, Prather denied telling Officer Suber he "beat the shit out of [Victim] and those were devastating blows." Prather claimed he hit Victim only three times as necessary to defend himself against a larger man. Prather stated he was not responsible for "leaving [Victim] in this condition," including beating him on the sofa, carving rapist on his back, or covering him with a blanket.

After the defense rested, out of the presence of the jury, the State informed the trial court it intended to call Paul LaRosa, an expert on crime scene analysis, as a reply witness "to explain the crime scene." Prather argued the reply testimony was not an "appropriate response to the testimony given by the defendant." The State asserted it was appropriate rebuttal testimony because Prather claimed "he left the house and that anything done after he left was done by Mr. Phillips."

LaRosa testified he worked at South Carolina Law Enforcement Division (SLED) as a special agent for eighteen years and worked in the crime scene unit for six years. LaRosa stated he was "currently assigned to the behavioral science unit as a criminal profiler" and his duties included reconstructing crime scenes to determine the natural flow of the crime. LaRosa testified he "trained under [a] court qualified crime scene analyst" and "went through intensive training with our Department of Mental Health." LaRosa stated he completed his crime scene analysis training in a two-month long program with the Federal Bureau of Investigation. LaRosa explained he previously testified as an expert in crime scene reconstruction and

assessment but this was "the first time as a crime scene analyst through the behavioral science program."

LaRosa stated he never physically examined the crime scene but rather reviewed photographs and a video of the crime scene along with reports regarding how police found Victim's body and Victim's autopsy report. LaRosa indicated he went over this case with two other crime scene analysts at SLED and they agreed with his analysis. LaRosa testified that the carving in Victim's backside and placement of the dildo, coupled with the opposing behavior of covering Victim, led him to believe there were "two specific personalities [and therefore] two offenders within that crime scene." LaRosa admitted he had not made criminal profiles for Prather, Phillips, or Victim because he "couldn't get a complete victimology, I couldn't look at their past histories, their psychological files or any of that." On cross-examination, LaRosa testified he also reviewed the transcript from Prather's first trial and "some of" Phillips's statements but claimed he did not use the statements in his analysis. LaRosa indicated the information provided to him by the prosecution was sufficient for him to determine "how many offenders were in the scene." LaRosa admitted he had "not looked at any mental health history from Mr. Prather, Mr. Phillips[,] or [Victim]."

Prather argued LaRosa's testimony was not proper reply testimony, it did "not possess enough scientific validity," and LaRosa was not "qualified as an expert in this area and never has been accepted as one." The trial court found the testimony appropriate on rebuttal based on Prather's claims as to what had occurred the night of the crime. The court explained under *State v. White*,<sup>3</sup> an expert witness can meet the qualification threshold and it is "up to the jury to believe . . . an expert witness." The court found LaRosa "sufficiently convinced the court that he qualifies as an expert in the field of crime scene analysis with regard to . . . crime scene assessment, behavioral analysis." The court also found the testimony was "sufficiently relevant, probative, and reliable." The court cautioned the State "no identification can be made as to who did what and no suggestion can be made to the jury as to their conclusion as to who did what." Prather objected to the court's ruling, arguing LaRosa's testimony would invade the province of the jury.

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<sup>3</sup> 382 S.C. 265, 273-74, 676 S.E.2d 684, 688 (2009) (explaining an expert may satisfy the qualification threshold and any "defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility"; a trial court may take the same approach with the reliability factor "after making a threshold determination for purposes of admissibility").

In the presence of the jury, LaRosa explained an offender uses "staging" to alter "the crime scene from what truly happened. It is to get law enforcement . . . on a different idea." He testified the carving of the word rapist on Victim's backside did not impact the actual murder and was a "superficial wound." LaRosa explained, "It's the offender's way of saying, hey, look at this guy. Not only is he a bad guy, he's bad enough that somebody's carving rapist in his back." He testified, "Whether . . . that is what they believe or not, I can't say, but they want to project that to the first responders that this guy's a rapist." LaRosa stated the placement of the dildo was "another example of evidence that is not necessary to commit the crime." He continued "not only is this offender, the personality wanting to carve rapist into this individual[']s back, he finds that one item for shock value to show what type of rapist he is and . . . places it gently underneath his arm pit." Additionally, LaRosa testified, "This is a classic case of undoing, which is covering up the victim with a blanket and pillow. It is symbolically erasing what has occurred in the scene." LaRosa stated the theories of staging and undoing "are in absolute conflicts with each other." He concluded there were "[t]wo distinct offenders who [in] the heat of the moment one of them decides to carve the word rapist and place an adult sex toy, a dildo next to him, and the other one taking blankets and wanting to erase, to just undo what has just occurred." He also stated, "I can't tell which offender, if both of them were not participating in the crime itself, of the physical assault, but there were two offenders that have different personalities, different behaviors at the end while the victim is dying."

The jury found Prather guilty of murder and robbery. The trial court sentenced Prather to ten years' imprisonment for robbery and thirty years' imprisonment for murder, to run concurrently. Prather filed a motion for a new trial, arguing the trial court erred by allowing LaRosa's reply testimony and qualifying him as an expert in "crime scene analysis." The trial court denied Prather's motion. This appeal followed.

## **LAW/ANALYSIS**

### **I. Rebuttal Testimony**

Prather argues the trial court erred in permitting LaRosa's testimony on reply. We agree.

The admission of reply testimony is within the sound discretion of the trial court. *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). "Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to

complete the plaintiff's case-in-chief." *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). Testimony that is "arguably contradictory and in reply to" that offered by the defense is admissible. *Todd*, 290 S.C. at 214, 349 S.E.2d at 340. However, reply testimony should be limited to that which refutes or rebuts testimony presented by the defendant. See *State v. Durden*, 264 S.C. 86, 90, 212 S.E.2d 587, 589 (1975) (finding reply testimony proper noting "[t]he reply testimony did not go beyond a refutation of that which the [defendant]'s witness had asserted"); *State v. Garris*, 394 S.C. 336, 351, 714 S.E.2d 888, 896 (Ct. App. 2011) (affirming admissibility of reply testimony that rebutted the defendant's claim he did not own a pistol or fire one on the day in question); *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 438, 319 S.E.2d 695, 700 (1984) (finding admission of rebuttal testimony appropriate when "[t]he Commission properly limited the rebuttal evidence strictly to a reply to [the appellant]'s evidence, and the Commission's Order demonstrates clearly that [the respondents'] rebuttal evidence was related only to the specific issues raised by [the appellant's witness]").

In *Durden*, in which the defendant was convicted of killing his wife's ex-husband, the wife "testified that she had on occasions called the police to their home because of rowdy conduct of the [victim] on her premises." 264 S.C. at 90, 212 S.E.2d at 589. In reply, the State called a police officer who denied this testimony and testified the police had not received any calls about the victim. *Id.* Our supreme court found the officer's "reply testimony was made necessary by the evidence which the [defendant] had submitted. The reply testimony did not go beyond a refutation of that which the [defendant]'s witness had asserted." *Id.* The court reasoned it could "hardly be argued that the [defendant]'s counsel was taken by surprise." *Id.* Accordingly, the court found "no error." *Id.* at 90, 212 S.E.2d at 590.

In *Garris*, the defendant argued "the trial court erred in denying his request to call an expert to rebut the reply testimony given by the State's expert." 394 S.C. at 350, 714 S.E.2d at 896. Our court explained the defendant "took the stand and testified he did not have or handle a gun the day he was arrested [but] fired a rifle the day before." *Id.* In response, the State called "a SLED agent who performed a gun residue analysis on samples taken from [the defendant's] hands." *Id.* at 350-51, 714 S.E.2d at 896. In proffered testimony, the agent opined the defendant had fired a pistol; the defendant objected because this information was not in the agent's report and the defendant had just learned about it during the proffered testimony. *Id.* at 351, 714 S.E.2d at 896. However, the trial court allowed the "testimony to be presented to the jury to rebut [the defendant's claim] he did not own a pistol or fire one." *Id.* Our court found the agent's "testimony was properly

limited to a reply to" the defendant's testimony because the State put the agent on the stand to rebut the defendant's "testimony that he did not own a pistol and had not shot one the day of the incident." *Id.*

Furthermore, in *State v. McDowell*, the defendant was convicted of murdering his sixteen-year-old son by shooting him in the head, and the defendant told the police his "third shot was fired after [the victim] had fallen to the floor." 272 S.C. 203, 205, 249 S.E.2d 916, 917 (1978) (per curiam). "At trial, however, [the defendant] testified the third shot was fired in rapid succession to the second shot while [the victim] was standing." *Id.* The defendant argued the trial court "erred by permitting the examining pathologist to testify for the State on reply that the victim's head was resting against a hard, flat object at the time the third shot was fired." *Id.* at 206, 249 S.E.2d at 917. The basis for the defendant's argument was his "contention that this testimony should have been introduced during the State's case[-]in[-]chief and was improper reply testimony." *Id.* Our supreme court found the testimony "was in reply to the [defendant]'s testimony that the third shot was fired while the victim was still standing," and was unnecessary until the [defendant] testified in direct opposition to his earlier statements." *Id.* at 206-07, 249 S.E.2d at 917.

Unlike the previous cases, LaRosa's testimony was not proper reply testimony because the rebuttal should have been limited to refuting Prather's testimony, rather than to complete the State's case-in-chief. Prather claimed he waited in his vehicle for about ten minutes after Phillips went back inside Victim's residence. He denied carving rapist in Victim's back and covering Victim with a blanket, and he claimed he merely saw "a dildo on the bed by [Phillips]'s feet." In reply, LaRosa opined there were "two distinct offenders" in this crime scene because there were "two specific personalities." LaRosa testified in detail about staging and undoing, why someone would carve rapist in a victim's back, and about the level of anger associated with superficial cutting. LaRosa opined the offenders used the dildo "for shock value to show what type of rapist [Victim] is" and the blanket to "symbolically eras[e]" what had occurred at the scene.

Prather did not testify to the number of perpetrators or to anyone's motives for carving rapist, for the placement of the dildo, or for covering Victim with a blanket at the scene.<sup>4</sup> He did not testify to any of the conduct surrounding these events.

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<sup>4</sup> We are not convinced by the dissent's citation to the following testimony that Prather testified one person committed the crime and associated acts, regardless of what the jury may have inferred from it.

He did not testify they happened in a specific manner or for a specific reason but simply denied doing them or being present when they occurred. Such broad expert testimony on reply "explain[ing] the crime scene" could not reasonably be anticipated by Prather. See *McGaha v. Mosley*, 283 S.C. 268, 277, 322 S.E.2d 461, 466 (Ct. App. 1984) ("Since reply testimony is limited to issues raised by the defense, the element of surprise is eliminated when reply is properly restricted."); *Durden*, 264 S.C. at 90, 212 S.E.2d at 589 (finding "reply testimony did not go beyond a refutation of that which the appellant's witness had asserted[,] and therefore it could "hardly be argued that the appellant's counsel was taken by surprise").

Accordingly, we conclude the trial court abused its discretion in allowing LaRosa's testimony on reply as it was not limited to refuting or rebutting specific testimony from Prather, but was general testimony as to the circumstances of the crime.

## II. Harmless Error

The State contends the admission of LaRosa's reply testimony was harmless beyond a reasonable doubt because Prather admitted he assaulted Victim, and LaRosa's testimony did not identify Prather as the second perpetrator. We disagree.

"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. Error is harmless when it 'could not reasonably have affected the result of the trial.'" *Id.* (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). "[O]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable

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"[State]: And Joshua Phillips was alone in the house for eight to ten minutes?"

"[Prather]: "Somewhere around there."

Prather's answer to the compound question is more responsive to the length of time that passed than the number of individuals in the house or what Phillips did while inside. The remaining testimony cited by the dissent is a basic denial of the crime. Additionally, the record demonstrates Victim's roommate remained in the house after Prather claims to have left.

doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012).

In this case, the jury was presented with testimony regarding prior statements by Prather to police and the emergency room nurse that he had beat up Victim and had struck him with "devastating blows" and had "beat the shit" out of Victim. Prather admitted in his trial testimony he struck Victim three times as necessary to defend against a larger man. Both Rabon and Prather testified Phillips had hit Victim earlier in the evening, and Rabon claimed to have seen Victim and Phillips in what appeared to be a sexual encounter. Prather testified Phillips hit and kicked Victim after Prather returned to the house and retrieved Phillips from the bedroom. According to Prather, Phillips went back inside to get his shoes while Prather waited in his car. At that point, it was within the jury's province to determine what version of events was more credible based on all the evidence and testimony.

LaRosa testified two people were present at the crime scene and manipulated the crime scene to present a particular version of events to authorities. Such expert testimony left little room for the jury to conclude anything other than that Prather was the second offender, as the State's theory of the case was that Prather and Phillips acted in concert to take advantage of Victim. *See State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) ("[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."). Not only did LaRosa espouse *his* opinion as to the circumstances of the crime, he bolstered the credibility of his own testimony by stating his assessment of the case had been reviewed by other SLED agents who agreed with him. While Prather did not specifically object to this improper bolstering, the augmentation of LaRosa's credibility likely affected the weight given his testimony by the jury.

Finally, while not determinative in our analysis, the hung jury in Prather's previous trial supports our conclusion that LaRosa's testimony affected the outcome of this trial. *See Christopher v. Florida*, 824 F.2d 836, 847 (11th Cir. 1987) (stating the court's conclusion that the admission of defendant's confession in second trial was not harmless error was "buttressed" by defendant's first trial having ended in a hung jury); *United States v. Ince*, 21 F.3d 576, 585 (4th Cir. 1994) ("Had the case against [defendant] been as strong as the Government would have us believe, it seems unlikely that the first jury would have ended in deadlock."); *United States v. Paguio*, 114 F.3d 928, 935 (9th Cir. 1997) ("We cannot characterize the error as

harmless, because the hung jury at the first trial persuades us that the case was close and might have turned on this [erroneously admitted] evidence."'). According to Prather's brief, two new elements were introduced in his second trial. First, the State introduced redacted portions of Phillips' written statements in which the word rapist was spelled "rapeist." The carving on Victim's backside was spelled correctly. Second, the State introduced LaRosa's testimony on reply. We cannot assign comparative weight to this new evidence and testimony or discern with certainty how each may have influenced the jury. However, we are not convinced beyond a reasonable doubt that LaRosa's improperly bolstered, expert testimony which implicitly pointed to Prather's involvement, did not contribute to the second jury's guilty verdict. That conclusion is buttressed by the previous hung jury.

We conclude the trial court erred in allowing LaRosa's testimony because it was not proper reply testimony. Furthermore, we conclude under the totality of the circumstances, the admission of his testimony was not harmless. Therefore, we reverse and remand to the trial court for a new trial.<sup>5</sup>

**REVERSED AND REMANDED.**

**LEE, A.J., concurs.**

**WILLIAMS, J., dissenting.**

**WILLIAMS, J.:** I respectfully dissent and I would affirm the circuit court.

**I. Reply Testimony**

In my view, the circuit court did not abuse its discretion when it admitted the State's reply testimony. Accordingly, I would affirm the circuit court as to this issue.

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<sup>5</sup> Because our resolution of the prior issue 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 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive). While we decline to rule on the reliability of crime scene analysis testimony in general, 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 codefendant's prior statements, and none of the mental health histories of the parties.

Reply testimony is inadmissible to complete the plaintiff's case-in-chief and should be limited to rebutting matters the defense raised. *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). "The admission of reply testimony is a matter within the sound discretion of the [circuit court]." *State v. Stewart*, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984). However, "an abuse of discretion does not occur solely because the reply testimony is contradictory to the previously presented testimony." *Huckabee*, 388 S.C. at 243, 694 S.E.2d at 786.

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. When examining his claims in the context of his entire testimony, Prather inferred that only one person committed these acts.<sup>6</sup> Conversely, the

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<sup>6</sup> Specifically, Prather stated:

[State]: Now, let's talk about this crime scene. It's your testimony that you're not the one responsible for leaving [Victim] in this condition?

[Prather]: No, I'm not.

[State]: That you didn't beat [Victim] down on that sofa; correct?

[Prather]: That's correct. I didn't.

....

[State]: You didn't pull his pants down and carve on him?

[Prather]: No.

[State]: And you didn't go into the bedroom and take this object out of the bedroom, this sex object, and place it beside [Victim]'s body, did you?

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."<sup>7</sup> Accordingly, I do not find that the circuit court abused

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[Prather]: The last time I saw it, it was at Josh's feet in that room. And, no, because I'm not touching that thing.

[State]: You're not responsible for the cigarette burn on [Victim]'s finger; is that your testimony?

....

[Prather]: No, I'm not responsible for the cigarette burn.

[State]: 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?

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

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

[Prather]: No.

[State]: And Joshua Phillips was alone in the house for eight to ten minutes?

[Prather]: Somewhere around there.

<sup>7</sup> At trial, LaRosa testified:

[LaRosa]: Undoing is a term that we use in crime analysis where an offender would want to erase, symbolically erase what has happened. In this case, it could be -- it's on a spectrum. You

its discretion in allowing LaRosa's testimony on reply. *See State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) ("The admission of reply testimony is within

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could have a lot or you can have a little, where an offender may throw a t-shirt over a victim's face because they can't look at it any more. It's not what they want -- they don't want to remember him a certain way. This is a classic case of undoing, which is covering up the victim with a blanket and a pillow. It is symbolically erasing what has occurred in the scene.

[State]: Is staging and undoing show the same emotion [sic]?

[LaRosa]: They are in absolute conflicts with each other. You have this -- I don't want to call it elaborate, but I'll call it detailed staging of taking the time to carve the word rapist in the back of the victim and then placing the adult sex toy next to him to show first responders that this guy is a rapist. Hey, look at this. They are yelling. They are expressing this is the way I want this guy to be portrayed, as a rapist. Then you have another personality that goes in and says, I'm not comfortable with that. I'm going to undo it, cover it up. You have two distinct personalities which points us to me and my opinion that you have two offenders within that scene at the same time.

....

[LaRosa]: Yes, yes. Two distinct offenders who at the heat of the moment one of them decides to carve the word rapist and the place an adult sex toy, a dildo next to him, and the other one taking blankets and wanting to erase, to just undo what has just occurred.

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.").

Additionally, I disagree with Prather's remaining arguments on the admission of the reply testimony, and accordingly, would affirm the circuit court based on the lack of prejudice to Prather. "[T]he improper admission of [reply testimony] may not serve as the basis for reversal unless found to be prejudicial." *State v. Farrow*, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998) (per curiam).

In the instant case, I do not believe LaRosa's reply testimony prejudiced Prather. LaRosa's testimony was general in nature and only sought to establish the presence of two people at the crime scene, rather than to establish Prather as the sole perpetrator. Moreover, LaRosa's testimony regarding the personality traits of those involved in the crime was offered to show the differing and distinct personalities that would engage in staging and undoing, which ultimately supported his conclusion that two people participated in the crime scene. LaRosa made no mention of Prather's name or any of Prather's personality traits during his reply testimony. Indeed, LaRosa did not offer his testimony as evidence of Prather's involvement in the crime; rather, LaRosa discussed the distinct personality traits to demonstrate that two individuals necessarily participated.

Last, regardless of whether the reply testimony was proper, I would find the circuit court's admission of reply testimony to be harmless error. *See State v. McClellan*, 283 S.C. 389, 393, 323 S.E.2d 772, 774 (1984) ("However, [when] guilt is proven by competent evidence and no rational conclusion can be reached other than the accused's guilt, a conviction will not be set aside because of insubstantial errors not affecting the result."). Prather's admission to striking Victim; other witnesses' testimony that Prather claimed: to have struck Victim with "devastating blows," to have left Victim barely alive, and that he needed to wash the blood off of his hands; and the pathologist's testimony that Victim's death was caused by an irregular heartbeat that resulted from the stress of a beating and an enlarged heart provide competent evidence to establish Prather's guilt in this case. Moreover, I respectfully disagree with the majority's view that the additional evidence of LaRosa's testimony affected the outcome of this trial; particularly to their point that LaRosa's testimony left the jury with only the conclusion that Prather was the second offender. *See State v. Black*, 400 S.C. 10, 30, 732 S.E.2d 880, 891 (2012) (determining the error to be harmless after a review of the entire record and finding the admission of additional evidence against the defendant "could not reasonably have affected the jury's result in this case"). In the instant case, prior to LaRosa's testimony, evidence that stolen items were found in Prather's vehicle and on

Phillips; that blood was found on Prather's sock and on the back of his shirt; and that a knife was found in Prather's car indicated Prather and Phillips were involved in Victim's murder and supported the State's theory of the case. Accordingly, any error resulting from the State's reply would be harmless.

In conclusion, I would affirm the circuit court's admission of the reply testimony because it was properly admitted. Furthermore, I do not believe Prather established he sustained any prejudice. Last, I would affirm the circuit court because any error Prather may have established by the admission of the reply testimony would be harmless.

## II. Remaining Issues

In addition to Prather's argument regarding reply testimony, he also argues that: (1) LaRosa's testimony was not properly produced during discovery; (2) the State committed prosecutorial misconduct when it "sandbagged" the defense with LaRosa's testimony; (3) the introduction of a portion of Prather's codefendant's statement to the police was inadmissible hearsay, unreliable, irrelevant, and violated Prather's Confrontation Clause rights; (4) the circuit court improperly denied Prather's motion for a directed verdict; (5) the State denied Prather's right to due process when it pursued factually inconsistent theories in Prather's and his codefendant's cases; (6) the circuit court denied Prather due process when it did not allow him to introduce a statement from an unavailable witness; and (7) the circuit court violated Prather's Fourth Amendment rights when it did not suppress evidence produced as a result of a fatally defective warrant.<sup>8</sup> I would affirm the circuit court as to Prather's remaining issues on appeal.

1. Regarding Prather's arguments that LaRosa's testimony was not properly produced during discovery and the State committed prosecutorial misconduct when it "sandbagged" the defense with LaRosa's testimony, I would find these issues unpreserved. Prather did not raise these issues during the in camera hearing or at trial; instead, Prather first raised these arguments in his motion for a new trial. See *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."); see also *State v. King*, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999) (finding that a party cannot raise an evidentiary issue for

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<sup>8</sup> The majority did not address these issues because its holding was dispositive.

the first time in a new trial motion). Thus, I would affirm the circuit court as to these two issues.

2. Similarly, I would find the circuit court did not abuse its discretion by allowing the State to introduce a portion of the statement of Prather's co-defendant—Phillips—to the police, in which Phillips misspelled rapist.<sup>9</sup> As to whether the statement was inadmissible hearsay under the South Carolina Rules of Evidence; unreliable; and irrelevant, I would find this argument unpreserved. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94 (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal.”); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector.”). Prather did not object to the statement's admissibility on these grounds or as hearsay during the in camera hearing or contemporaneously during trial. Rather, Prather specifically raised an objection to the admissibility of the statement based solely on the exclusion of testimonial evidence under the Confrontation Clause. Thus, I believe Prather's assertion that portions of Phillips' statement are inadmissible, unreliable, and irrelevant is unpreserved.

Regarding Prather's Confrontational Clause argument, I would find the circuit court did not abuse its discretion because the State only introduced two words from a six page document and redacted every other remaining word. The admission of a redacted statement does not violate the Confrontation Clause when the statement does not incriminate the defendant on its face, even though "its incriminating import was certainly inferable from other evidence that was properly admitted against [the defendant]." *State v. Evans*, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). Here, Prather's rights were not violated because only the two misspelled words from Phillips' statement to the police were admitted with the remaining six page document being redacted. Furthermore, "rapeist" does not incriminate Prather on its face, even though its incriminating nature was inferable from other admissible evidence, and Prather had the opportunity to cross-examine Officer Jones, who testified to witnessing Phillips spell the word incorrectly. Thus, I would affirm the circuit court on this issue.

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<sup>9</sup> Phillips spelled the word "rapeist."

3. As to Prather's argument that the circuit court erred in denying his motion for a directed verdict, I would find evidence supports the circuit court's findings. See *Sellers v. State*, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) ("When ruling on a [defendant's] motion for directed verdict, a [circuit] court is concerned with the existence of evidence, not its weight."); *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002) (finding the appellate court may only reverse the circuit court if no evidence supports the circuit court's ruling); *State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.").

Specifically, Prather asserts the State failed to prove proximate cause existed between his actions and Victim's death. However, the record demonstrates the circuit court properly denied Prather's motion for a directed verdict because evidence supported submitting this issue to the jury. See *State v. Dantonio*, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) ("A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased. The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." (citation omitted)). Indeed at trial, witnesses testified Prather admitted to severely beating Victim. Moreover, the pathologist testified the stress of the beating and an enlarged heart caused the death of Victim. Accordingly, I would affirm the circuit court's denial of Prather's motion for a directed verdict.

4. As to whether Prather's rights to due process were denied because the State pursued factually inconsistent theories in Prather's and Phillips' cases, I would find this issue unpreserved. Prather failed to raise this issue to the circuit court at trial or in his post-trial motion. See *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."); *State v. Varvil*, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000) ("Constitutional arguments are no exception to the rule, and if not raised to the [circuit] court are deemed waived on appeal.").

5. As to whether the circuit court abused its discretion by not allowing Prather to introduce a statement from an unavailable witness, I would affirm the circuit court's ruling because, notwithstanding the statement containing two levels of hearsay, I believe the statement to law enforcement does not fall under the present

sense impression or excited utterance exceptions to the rule against hearsay. *See* Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the [South Carolina Supreme Court] or by statute."); Rule 803(1), SCRE (defining "present sense impression" as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"); Rule 803(2), SCRE (defining "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"); *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014) (finding victim's mother's statement to a 911 operator—in which victim's mother stated victim's boyfriend broke into the house, beat up victim, and raped victim—was inadmissible hearsay not covered by the present sense impression exception because the mother did not perceive the rape contemporaneously while she made the statement); *State v. Davis*, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006) ("[S]tatements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule.").

In the instant case, Prather attempted to introduce a statement made by Jody Becknell—who was deceased at the time of the trial—to law enforcement regarding a conversation he had with Victim, wherein Victim described his injured ribs to Becknell. Becknell did not perceive Victim's rib pains, did not witness the event causing the pain, and did not have firsthand information about the event when he relayed the information to the police. Therefore, regardless of whether Victim's statements to Becknell would fall under an exception to hearsay, Becknell's statement to the police would not qualify under the excited utterance or present sense impression exceptions to the rule against hearsay. Accordingly, I would affirm the circuit court as to this issue.

6. Finally, as to whether the circuit court violated Prather's Fourth Amendment rights by not suppressing the Coca-Cola glasses and knife found in his car pursuant to a fatally defective warrant, I would find the circuit court did not commit an error because the inevitable discovery doctrine would permit admission of this evidence. *See State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On appeals from a motion to suppress based on Fourth Amendment grounds, [the appellate court] applies a deferential standard of review and will reverse if there is clear error."); *State v. Spears*, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)) (stating that the inevitable discovery doctrine—an exception to the exclusionary rule—allows for the admission of illegally obtained evidence if the prosecution can establish by a

preponderance of the evidence that the evidence would inevitably or ultimately have been discovered by lawful means). Upon review of the record, I find the State satisfied its burden under the inevitable discovery doctrine when testimony detailed the police department's policy of impounding a vehicle and the department's policy of conducting a routine, warrantless inventory of an entire vehicle when impounded. Furthermore, the record demonstrates Prather's vehicle remained in the hospital's parking lot after police detained him, and the car would have been impounded. Therefore, I would find the circuit court committed no error in admitting this evidence.

# The South Carolina Court of Appeals

The State, Respondent,

v.

Robert Jared Prather, Appellant.

Appellate Case No. 2014-001500

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## ORDER

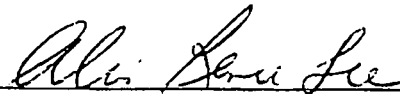
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Appellant was convicted of robbery and murder and sentenced to ten years' and thirty years' imprisonment, respectively. Appellant's conviction was reversed based on an evidentiary issue relating to the admission of reply testimony in a 2-1 decision of the Court of Appeals.

Appellant has filed a Motion for Bond Pending Appeal pursuant to Rules 240 and 246 of the South Carolina Appellate Court Rules. After consideration of the factors set forth in *In re Michael H.*, 360 S.C. 540, 602 S.E.2d 729 (2004), Appellant's Motion, and the State's Reply, the Motion for Bond Pending Appeal is denied.

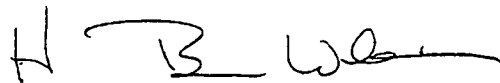


J.



A.J.

In keeping with my dissent, I vote to deny Appellant's Motion for Bond Pending Appeal.



J.

**FILED**

Dec. 6, 2017

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Columbia, South Carolina

cc:

Samuel R. Hubbard, III, Esquire

Alan McCrory Wilson, Esquire

Elizabeth Anne Franklin-Best, Esquire

Donald J. Zelenka, Esquire

J. Anthony Mabry, Esquire

The Honorable Clifton Newman



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ALAN WILSON  
ATTORNEY GENERAL

December 21, 2017

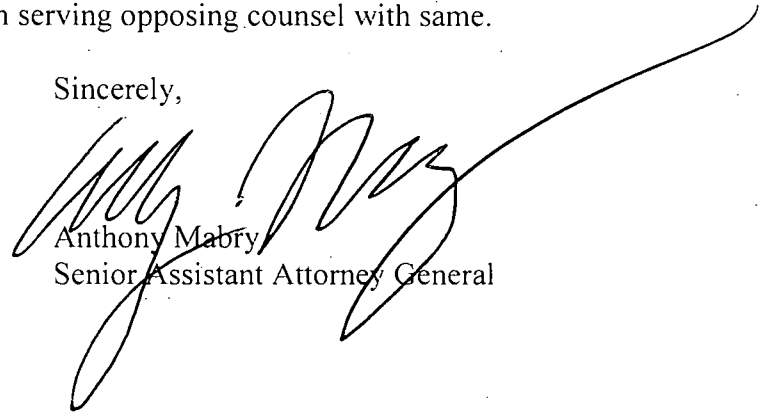
Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
P. O. Box 11629  
Columbia, South Carolina 29211

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 as to the Court of Appeals substituted Opinion issued December 6, 2017 in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,



Anthony Mabry  
Senior Assistant Attorney General

AM:dmd  
Enclosures

cc: The Honorable Daniel R. Shearouse, South Carolina Supreme Court (w/copy of encl.)  
Elizabeth Franklin-Best, Esquire (w/two copies of encls.)  
The Honorable S. Rick Hubbard, III, Solicitor, Eleventh Judicial Circuit (w/copy of encl.)