

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

S.C. Court of Appeals
Appellate Case No. 2014-001500
2018-00753

RECEIVED

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THE STATE,

Petitioner,

S.C. SUPREME COURT

v.

ROBERT JARED PRATHER,

Respondent

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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

ROBERT JARED PRATHER *Appellant,*

v.

STATE OF SOUTH CAROLINA *Appellee.*

APPELLANT'S FINAL BRIEF

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STATEMENT OF FACTS

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

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

A: Yes.

Q: Just drop dead?

A: Yes.

R.p.366, lines 12-17.

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

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

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

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

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

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

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

THE EVENTS OF APRIL 21- 22, 2005

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENTS

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

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

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

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

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

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

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

Before the jury, the State asked:

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

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

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

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

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

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

R.pp.761-62.

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

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

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

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

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

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

R.pp.833-34.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

R.p.987.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

R.pp.831- 832.

1. The Statement was Rank Hearsay

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

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

R. 976 (emphasis in original).

According to SCRE, Rule 801:

(c) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

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

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

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

2. The Statement was Unreliable

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

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

3. The Statement was Irrelevant⁸

Phillips' purported misspelling of "rapist" was additionally irrelevant to show that Prather carved "rapist" into the back of the decedent. Under SCRE, Rule 401, relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Just because "rapist" was spelled correctly on the decedent's back, it does not follow that Prather carved the word simply because his co-defendant misspelled it twice in a written statement to police (as the State knew since it told Judge McMahon that Phillips confessed to carving it, even though he also misspelled it in his statements). There is no way to know why Phillips misspelled the word in his statement—he may have been intentionally trying to set Prather up to look like the guilty party, for example. Or maybe Phillips has a learning disability and does not consistently spell words. Or maybe he was tired and sloppy when he wrote his statement. Or maybe Ron Rabon, who was at the house when Stewart died, carved the word into buttocks. This evidence was exceedingly

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

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

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

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

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

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

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

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

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

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

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

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

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

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

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

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

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

¹⁰ Also known as "Valium."

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

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

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

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

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

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

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

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

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

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

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

R.pp.1027-28.

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

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

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

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

R.p. 605, lines 4-23.

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

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

THE COURT: This would have been anal intercourse?

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

R.p.1022, lines 14-23.

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

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

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

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

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

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

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

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

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

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

R.p.634.

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

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

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

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

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

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

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

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

R.p.992.

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

CONCLUSION

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

Respectfully submitted,

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

Elizabeth A. Franklin-Best

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable Clifton Newman, Circuit Court Judge

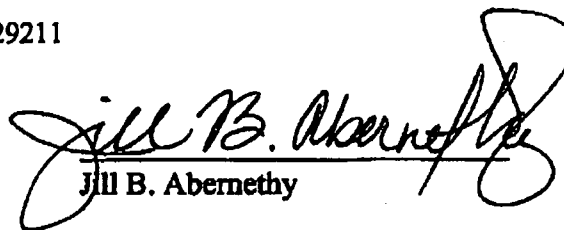
Case No. 2012-GS-32-2619
Appeal Case No. 2014-001500

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

CERTIFICATE OF SERVICE

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

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Respondent,

vs.

ROBERT JARED PRATHER,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court Judge Abused His Discretion, and Violated Prather's Rights to Due Process, by Allowing the State to Present a "Crime Analyst" When His Testimony Was (1) Not Proper Rebuttal Testimony, (2) Not Scientifically Valid, and (3) Invaded the Province of the Jury.
- II. The Trial Court Judge Additionally Abused His Discretion When He Allowed The Testimony Because It Was Not Produced In Discovery Pursuant to South Carolina Rules of Criminal Procedure, Rule 5 Or Brady v. Maryland.
- III. The State Committed Prosecutorial Misconduct and Violated Prather's Right to Due Process, When It "Sandbagged" The Defense With Larosa's Rebuttal Testimony.
- IV. The Trial Court Judge Abused His Discretion By Allowing The State To Introduce Prather's Co-Defendant's Inadmissible Hearsay Because (1) It Was Inadmissible The South Carolina Rules of Evidence, (2) It Was Unreliable, (3) It Was Irrelevant, and (4) Its Admission Violated Prather's Right to Confront The Witnesses Against Him In Violation Of The Eighth Amendment And South Carolina Law.
- V. The Trial Court Judge Erred, And Prather Was Denied His Right to Due Process, When He Denied Prather's Motion For A Directed Verdict Because The Evidence Did Not Rise Above A "Mere Suspicion" That Prather Caused The Decedent's Death.
- VI. The State's Actions In Pursuing Factually Inconsistent Theories In Prather and Phillips' Cases Denied Prather His Right To Due Process.
- VII. The Trial Court Judge Abused His Discretion, and Prather Was Denied Due Process Of Law When He Did Not Allow Prather to Introduce A Statement Made By Ralph Jody Webb Becknell, An Unavailable Witness, When The Statement Was Admissible As A Statement Would Have Corroborated Prather's Defense That He Was Not Responsible For Stewart's Death.
- VIII. The Trial Court Judge Erred and Violated Prather's Rights Under The 4th Amendment And South Carolina Law When He Did Not Suppress The Coca-Cola Glasses And Knife Pursuant To A Fatally Defective Warrant.

RESPONDENT'S STATEMENT OF THE CASE

On August 22, 2005, after midnight, appellant and a co-defendant murdered Gerald Stewart in his home in Lexington County and stole items from Stewart's residence. Appellant was arrested for the murder the following morning, still on August 22nd. Appellant was subsequently indicted by the Lexington County grand jury for murder, armed robbery, and burglary 1st degree. (Ind. #s 2012-GS-32-2619, 2621, 2622). He was represented by Wayne Floyd, Esquire. Appellant proceeded to a jury trial before the Honorable Clifton Newman from November 26 – 28, 2012.¹ At the trial's conclusion, the jury found appellant guilty of murder and common law robbery.² Judge Newman sentenced appellant to thirty (30) years for murder and ten (10) years for common law robbery. On December 7, 2012, appellant filed a motion for a new trial. Judge Newman held a hearing on the motion on February 7, 2013. The motion was denied by a written twenty-four (24) page Order on July 1, 2014. (Order). This appeal followed.

RESPONDENT'S STATEMENT OF FACTS

Gerald "Radar" Stewart ("the victim") was described as a large, big hearted man. He was known to cook at cookouts in West Columbia, was jovial, and "always cutting up." He was studying nursing at Midlands Technical College. However, he was not perfect. The victim was a chronic drinker, an alcoholic, and had sought treatment for the same for years. He could drink large amounts of alcohol and never pass out. The victim also had a tendency to brag, brag about important people he knew, and spend whatever money he had on him on others. (R. 184-85, 370-80, 503-11, 550). Unfortunately, these last tendencies came back to haunt him.

¹ Appellant was initially tried from October 26-29, 2009 but that jury was unable to reach a unanimous verdict.

² At the conclusion of the State's case, Judge Newman directed a verdict of not guilty on the burglary 1st degree charge.

On April 22, 2005, the victim was murdered in his own home at 1737 Decree Ave. in West Columbia. When police responded to the victim's home at approximately 5:30 a.m., the home's doors were locked, and police had to gain entry by crawling through an unlocked window to the residence. Once inside, police found the victim covered with a blanket and a pillow over his head. The blanket and pillow were removed. The victim was *fully clothed*, kneeling in front of his den couch, with his face planted in the couch seat cushion. A *cigarette butt* was found on the victim's shoulder. (R. 268-83, 283-91, 317-19, 831-32).

An Emergency Medical Technician (E.M.T.) called to the scene moved the victim's clothing to make sure there were no signs of life. After placing E.K.G. leads on the victim's body, the victim's heart showed no electrical activity or pulse. When removing the leads from the victim, the E.M.T. noticed someone had carved something in the victim's lower back and down his buttocks with a *sharp instrument*. The carving extended down under the victim's pants and underwear. The word "rapist" was carved into the victim's back-side. A sex toy [a dildo] had also been placed under the victim's shoulder on the couch. (R. 283-91, 322-23, 345).

The autopsy determined the victim died as a proximate result of a beating, blunt force trauma that caused a cardiac arrhythmia, and caused the victim's heart to stop beating. Smothering [suffocation] could not be ruled out as a contributing factor because of the position of the victim when he died. (R. 339-52).³ The victim had bruising around his left eye, a fractured nose, bruising and lacerations on the inside of his lips, scratch marks on his right thigh, bruising under the skin on the right chest and upper abdomen, two (2) fractured ribs on the left, bruising to the scalp on both sides of the head underneath the skin, a *cigarette burn* to the back of his

³ The victim was in poor health at the time he was murdered. He was a chronic alcoholic, obese, diabetic, had cirrhosis of the liver, an enlarged heart, and a blood alcohol of .279 [ocular fluid of .342] and valium in his toxicology screen. However, he did not die from bad health or his alcohol or drug content. It was the beating that killed him. (R. 339-52, 417, 506-07).

middle finger on his right hand, and the scratch marks on his buttocks and lower back. The last marks were from a sharp instrument and very superficial. Someone had scratched the letters into the victim's lower back and down to his buttocks before he died. All of the injuries to the victim occurred before his death. The manner of death was homicide, i.e. caused by the act of another or others. (R. 339-52).

Inside the home, police found the victim's new housemate, Rob Rabon ("Rabon"), asleep in his own bed in his own bedroom.⁴ Rabon informed police and testified at trial he had gone to sleep after midnight on April 22nd and he did not hear the victim's murder. Rabon had only recently moved into the victim's home after meeting the victim at an alcohol rehabilitation center. Rabon was "down on his luck," and the victim offered to let Rabon stay in his home and rent a room for \$100 a week. Rabon moved in one (1) week before the victim was murdered. A few days before the victim's murder, Rabon found out the victim was gay and was moving out of the home the day following the victim's murder. However, Rabon testified the victim did not make any homosexual advances toward Rabon, and Rabon had his own bedroom. (R. 512-47).

Rabon testified that earlier the previous day, April 21, 2005, appellant Jared Prather ("Prather") and his co-defendant, Joshua Phillips ("Phillips"), had come to the residence and were drinking with the victim and playing cards. Rabon testified when he met Prather and Phillips they represented themselves to be "Jerry" and "Ray" not Jared and Joshua. Based on their appearance and the way they were acting, Rabon was suspicious of the men and thought they were up to something. At one point, Rabon thought Prather and Phillips were gay and the two

⁴ The victim's housemate, Rabon, is partially deaf in one (1) ear and sometimes sleeps on the other ear. He had also been drinking that night and used some cocaine before going to bed. Rabon did not hear anything after going to sleep until police awakened him after they discovered the victim's body in the den. (R. 512-47). Appellant Prather testified at trial that Rabon had nothing to do with the victim's death. (R. 656-731).

(2) men were going to jump on him because he was not gay and had told the victim the same. Prather even asked Rabon if he was gay, and Rabon responded he was not. Prather then stated: "well, then I have a surprise for you, but maybe not now. [W]ell, then again, maybe I do." Rabon was uncomfortable with this conversation and decided to go to his own bedroom, and called a girlfriend and told her he was moving out the next day. (R. 512-47).

Rabon left his room a little later to get a beer, and there was an altercation in which "Ray" [Phillips] punched the victim in the lips twice busting his lip.⁵ Rabon stopped Phillips from punching the victim anymore by yelling at him. "Jerry" [Prather] also yelled at Phillips and told him to stop and to get something to clean the victim up, or he [Prather] was going to jump on Phillips. Phillips complied with Prather's order. Rabon testified based on his observations of the two (2) men, Prather was the leader and Phillips was the follower. Rabon then talked with the victim privately and told him he needed to "remove these people" from his home. The victim said everything was alright, and the victim let "Jerry" and "Ray" stay in his home. (R. 512-47).

At this point, Rabon made another phone call and to protect himself from "Jerry" and "Ray" decided to befriend "Jerry" [Prather] because he [Prather] was the "badest" or scariest of the two (2) men in the victim's home. Rabon struck up a conversation with Prather about drugs, and Rabon, Prather, and "Ray" [Phillips] left in Prather's car and bought some cocaine. Rabon and Prather used the drugs, but Phillips did not. They all returned to the victim's home, and Rabon and Prather had to carry Phillips back in the house, because "Ray" [Phillips] was either passed out or faking being passed out. "Jerry" [Prather] then left the victim's house alone and stayed gone for a period of time. Rabon went back to his bedroom. (R. 527-31).

⁵ A neighbor of the victim may have witnessed the beginning of this altercation which began outside in the victim's back yard or simply witnessed the victim, who was intoxicated, falling down and being assisted into his home. (R. 639-48).

Later during the night, Rabon got back up to go to the bathroom or kitchen, and saw the victim and "Ray" [Phillips] engaged in some kind of consensual homosexual sex in the living room and then in the victim's bedroom. Rabon did not like what he saw and returned to his room. Prather was not in the victim's home when this occurred; he was still gone. (R. 512-47).

A little while later, Prather came back to the victim's home and opened the door to the house and called in for "Ray." Rabon heard the victim get out of his bed and go in the bathroom, and then the victim and Prather left the residence and went somewhere. Rabon left his room and saw "Ray" [Phillips] still lying in the victim's bed. Rabon testified there was no argument or anything like that before the victim and Prather left together. Because things had calmed down, Rabon then got in bed and fell asleep because he had to go to work in the morning. The next thing Rabon knew, police were waking him up at 5:30 a.m., after they discovered the victim's body in the den. (R. 533-36).⁶

Police discovered the victim's body after receiving a call from the Lexington Medical Center Emergency Room ("the E.R."). Two (2) men had appeared at the E.R. at 4:28 a.m., with one (1) of the men, Prather, claiming the other, the co-defendant, Phillips, had been raped or sexually assaulted. Prather was doing almost all of the talking. (R. 181-96, 206, 562-64).

Prather told the E.R. nurse he and Phillips had been at an old man's home drinking, and Phillips passed out on the couch. Prather alleged he left the home and when he returned the old man answered the door naked and said something about having sex with his friend, Phillips.

⁶ The co-owner of "Uncle Louie's" bar corroborated Rabon's testimony confirming that around closing time, Prather and the victim came into "Uncle Louie's" and the victim purchased drinks. Prather did not drink anything. The victim left to go to a bar across the street, and then the owner, as he was closing up, spoke to the victim and Prather in the parking lot. Prather was driving and the victim, who was intoxicated, was in the passenger seat. Prather was not intoxicated. The owner did not remember any visible marks on the victim's face. (R. 548-62).

Prather found Phillips in the victim's bedroom with nothing but his boxers on. Prather stated it took them about an hour and a half to find Phillips' clothes because they were scattered all over the old man's house. Prather claimed he was so upset about what the old man had done to his long-time friend Phillips, that he beat the old man. (R. 562-64).

Prather told the E.R. nurse he had severely beaten the man who committed the rape or sexual assault. Both Prather and Phillips stated they had beaten the man. Prather stated the man who sexually assaulted his friend was alive, but barely. They both stated they had beaten the victim, and he was probably still laying there. Prather also stated he needed to wash blood off of his hands, and laughed. The nurse was so disturbed by what Prather said she made contemporaneous notes about the conversation. (R. 562-80).

The nurse then obtained the victim Gerald Stewart's wallet from Phillips, who had it on his person. Prather said the E.R. nurse could keep the wallet because, "it's not like it was a robbery or anything." From the wallet, the E.R. nurse obtained the victim's identification including his home address. At this point, Prather stated: "I'll probably go to jail for this, won't I?" The nurse, fearing for the safety of the old man, had the police called. (R. 562, 574-75).

Then the E.R. nurse could not find Prather or Phillips. She found Phillips outside the E.R. on a bench smoking a cigarette. Prather had disappeared. Phillips told the nurse Prather had gone to smoke a cigarette; however, Prather was nowhere around. The nurse searched the parking lot with Phillips, but Prather could not be located nor could his car. Phillips denied knowing what kind of car Prather drove and denied knowing Prather's name other than "Jerry." The nurse found this strange because Prather had told her he beat the man who allegedly assaulted Phillips because Prather and Phillips had been long-time friends. (R. 562-80).

At some point, Prather reappeared in the E.R. entering through the front door of the E.R. When the E.R. nurse asked a social worker to place Prather in a conference room, she reported Prather had gone to call his mother to let her know where he was. (R. 584-85).

The E.R. doctors who examined Phillips, found no evidence of a sexual assault or rape. A sexual assault kit was performed which was negative for any semen *or* DNA of the victim Gerald Stewart. There was no trauma to Phillip's rectum, *and* Phillips did not complain of a sexual assault. However, there were superficial marks and scratches on Phillip's arms and back indicating he had been in some type of struggle before arriving at the E.R. Phillip's toxicology screen was completely *negative* for alcohol or drugs. (R. 212-49, 250-58, 259-67, 425-26).

When police arrived at the E.R., Prather told them his friend [Phillips] had been sexually assaulted by the victim in this case, and as a result he, Prather, had severely beaten the victim. "I beat the shit out of him." Prather stated he had hit the victim with "devastating blows." Prather described striking the victim by striking his fist in the palm of his other hand. Prather stated the victim was probably alive, but barely. Phillips was present when these comments were made but "was withdrawn, quiet, wouldn't say anything, wouldn't even make eye contact with" one officer. Prather also admitted he had taken the victim's wallet so he and Phillips would have evidence of who did this to Phillips. Prather was taken into investigative detention. It was at this point other officers were dispatched to the victim's residence to check on his welfare and discovered the body as described above. (R. 181-96. 196-206).

In the E.R. parking lot, police located Prather's car. An officer was stationed with it while a search warrant was being obtained. In plain view in the car, the officer could see a *Coca Cola* collector's item box. This box belonged to the victim Gerald Stewart and had been stolen by Prather and Phillips. Several witnesses testified this box originally belonged to the victim's

father, who worked for *Coca Cola*, and the victim would not have parted with this item willingly. Eventually, the search warrant arrived and the car was towed to the towing company where a search/inventory was conducted. Police recovered the stolen *Coca Cola* collector's item box from Prather's car. In the front floorboard, under the *Coca Cola* collector's item box, police also found a *small knife*. (R. 291-96, 323-30, 321-22, 370-80, 503-06). Police also obtained the victim's wallet from the nurse who had obtained it from Phillips and Prather. Phillips also had in his possession collector's coins and bullets stolen from the victim's home. (R. 181-96, 309-11).⁷

Prather was searched at the police department. On his person, police found a pack of Marlboro *cigarettes* and a *cigarette lighter*. (R. 441-42). Prather's clothes were also collected. The victim Gerald Stewart's blood [DNA] was found on Prather's socks and on the back of his shirt. (R. 495-96).

Prather was interviewed at the police department and gave a statement regarding his *alleged* version of events that night. He informed police he was not gay nor was Phillips. He did not know the victim [Stewart] was gay, but was suspicious he might be. Prather and Phillips had known each other for about five (5) years graduating high school together. Earlier the previous day, he and Phillips went to the victim's residence and drank and left but then returned in the evening. Phillips and the victim then got drunk on whiskey, and Phillips fell asleep on the couch around midnight. Prather stated first that he left by himself to return a box of Phillips' clothes to Phillips' brother's home. Prather then changed his statement and stated he and the victim

⁷ Prather's co-defendant, Phillips, was not called by either the State or Prather as a witness. In relation to this case, Phillips pled guilty to armed robbery in 2009 and was sentenced to ten (10) years and pled guilty to voluntary manslaughter and was not sentenced. He subsequently refused to cooperate with the State and his convictions were vacated through a PCR action. Phillips eventually pled guilty again to armed robbery and voluntary manslaughter on December 5, 2012, before Judge McMahon and was sentenced to a negotiated sentence of twenty (20) years concurrent on both charges. (R. 1004-39).

Stewart left together and went to "Louie's" a bar and then returned to the residence. Then, Prather claimed he left alone and took the box of clothes to the brother's home. (R. 585-611).

Prather claimed when he returned, he entered the home without knocking, and the victim [Stewart] came out of his bedroom completely naked.⁸ Stewart made a remark about committing oral sex on Phillips and that Phillips liked it. Prather said he found Phillips on Stewart's bed with nothing but his boxers on. He had trouble waking Phillips, and had to pull him out of the bed by his hair. As he was leaving the residence with Phillips, Prather claimed the victim [Stewart] grabbed him by the arm, and Prather stated he pushed Stewart over a footstool and as Stewart was falling, Prather hit Stewart a few times. Prather then claimed he and Phillips left the house together immediately, got in Prather's car, and drove away. (R. 585-611).

Prather at first stated they drove immediately to the hospital. He then changed his statement and stated he and Phillips went to "Calloway's" bar and shot pool. They then decided to go to the hospital. (R. 585-611).

The officer who interviewed Prather confronted him with the fact his shirt was completely clean, and the crime scene was extremely bloody. The officer told Prather he was lying and told Prather he wanted the clothes Prather was wearing at the time of the murder. Prather curled up in a ball and started crying and terminated the interview. (R. 585-611).

⁸ This contradicted Prather's statement to two (2) different police officers and the nurse at the E.R. where he told them when he returned to the victim's home, the door was locked and he banged on the door, and the victim answered the front door nude. (R. 188, 201).

Argument I.

Judge Newman did not abuse his discretion in admitting proper reply testimony.

The Issue

On appeal, Prather alleges Judge Newman abused his discretion, and violated his rights to due process, by allowing the State to present a "crime scene analyst" when this testimony was *allegedly* (1) not proper reply, (2) not scientifically valid, and (3) invaded the province of the jury. This argument fails because (1) the State properly presented the reply testimony in response to claims made by Prather in his testimony, (2) the validity of crime scene staging testimony has been affirmed multiple times by state courts as an appropriate form of *opinion* testimony, and (3) based on South Carolina precedent, the testimony did not invade the province of the jury since at no point did the witness opine on the law of the case, Prather's state of mind, or Prather's guilt.

What Occurred Below

At trial, Prather testified he did not cause the death of the victim. Specifically, Prather testified he believed the victim sexually assaulted his co-defendant; he struck the victim only three (3) times; he left the house after striking the victim; he did not carve the word "rapist" on the victim's back or have anything to do with that and he did not cover the victim up; he did not see either of those things occur; and, after he left the victim's home, the co-defendant, who had also beaten the victim, remained in the house with the victim for approximately 8 to 10 minutes before coming out and getting in the car with Prather. (R. 656-731).

The State moved *in camera* to be allowed to call Special Agent Paul LaRosa in reply to Prather's testimony. The State proffered LaRosa's qualifications and testimony *in camera* for Judge Newman's determination of its admissibility pursuant to 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). (R. 731-55).

The State established the following regarding the knowledge, skill, experience, training, and education of Agent LaRosa as it relates to crime scene analysis: He had been employed by the State Law Enforcement Division (SLED) 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 two (2) qualified crime scene analysts at SLED. He interned with the S.C. 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 two-month internship with the Federal Bureau of Investigation (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 as an expert 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. LaRosa reviewed the crime scene photographs and video, the reports of first responders regarding how they found the victim's body, and he was present for the testimony of Prather in this trial. (R. 731-51).

Agent LaRosa testified he found evidence of "staging." He explained "staging" is a term used in crime scene assessment and reconstruction⁹ indicating the person who committed the crime altered the crime scene in order to misdirect law enforcement and hide the truth. He

⁹ See State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

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 by a blanket and pillow, and this was a classic case of "undoing." "Staging" and "undoing" are two (2) completely distinct and conflicting emotions. Based on his review of the evidence and Prather's testimony, he concluded two (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's testimony was proper reply testimony given Prather's trial testimony; 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 State v. Tapp. (R. 752-55). As a result, the State introduced the testimony in reply. (R. 755-74).

The issues not preserved

Prather raises several issues not preserved for appellate review because they were not raised at trial. 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. These issues are not preserved for appellate review. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998)(constitutional arguments must be raised to be preserved); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000)(same); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)(a new trial motion may not be used to raise an evidentiary issue for the first time); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), *citing* State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996). Regardless, there is no merit to any of the issues Prather raises.

*Standard of Review
(Reply Evidence or Testimony)*

The admission of reply testimony is within the discretion of the trial judge. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). "The admission of evidence in reply rests largely in the discretion of the trial judge, and this court on appeal will not interfere, unless there has been an abuse of discretion." Goethe v. Browning, 146 S.C. 7, 143 S.E. 362 (1928). If evidence is relevant and admissible, the order in which such evidence is received must be left the sound discretion of the trial judge, and his ruling will not be reversed unless it clearly appears that there was an abuse of discretion. State v. Van Williams, 212 S.C. 110, 46 S.E.2d 665 (1948).

(Expert Witness' Testimony)

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." White, 382 S.C. at 269, 676 S.E.2d at 686, *quoting State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). *See also* Rule 702, SCRE ("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."); Mizzell v. Glover, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) ("A trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion).

The Law

Any testimony which is presented to rebut, contradict, or impeach the case presented by the defense is proper on reply. 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).¹⁰ "Reply testimony should be limited to rebuttal of matters raised in defense." State v. Farrow, 332 S.C. 190, 504 S.E.2d 131 (1998) *citing Daniel v. Tower Co.*, 205 S.C. 333, 32 S.E.2d 5 (1944). Reply testimony may not be used to complete the prosecution's case. *Id.*; State v. Robinson, 223 S.C. 314, 75 S.E.2d 465 (1953). Reply testimony should not be admitted where the testimony involves a collateral issue. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973); State v. Brock, 130 S.C. 252, 126 S.E.2d 28 (1924). 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).¹¹ Thus in a

¹⁰ *See also State v. Stewart*, 283 S.C. 104, 3220 S.E.2d 447 (1984); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); 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).

¹¹ *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).

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).

The Lack of Merit of Prather's argument

The State presented testimony of a crime scene analysis expert to rebut Prather's testimony the murder of the victim had not been committed by two (2) people. LaRosa testified based on his expertise and the materials he reviewed it was his opinion there were two (2) personalities at work or involved in the crime because of contradictions in the crime scene's staging and undoing. This testimony was proper as it directly challenged and contradicted the defense's theory raised through Prather's testimony that only (1) person committed the murder, Phillips, and Prather was not involved. State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904). See Farrow, citing Daniel v. Tower Co., 205 S.C. 333, 32 S.E.2d 5 (1944).¹²

Prather argues LaRosa's testimony should have been presented earlier, in the State's case-in-chief. As support for this, Prather cites State v. Watson, 353 S.C. 620, 632, 579 S.E.2d 148, 150 (Ct. App. 2003), in which this Court stated that "if the evidence sought to be introduced in *surrebuttal* could or should have been introduced at an earlier stage, its admission or rejection is a matter for the discretion of the trial court, as where the evidence is cumulative, or where there is no sufficient excuse for not introducing the evidence in chief at the proper time." Watson, at 632, 579 S.E.2d at 150. However, Prather's use of Watson is deceptive. Prather seems to have misread Watson as applying to *rebuttal testimony*, however, it is quite clear from the language above Watson concerned the admission of testimony in *surrebuttal*. *Id.* Regardless,

¹² Prather admits in his brief the expert's testimony directly contradicted Prather's testimony and version of events. (See IBOA). Therefore, the evidence was proper reply testimony.

the Watson court made clear even if the evidence should have been introduced "at an earlier part of trial," it is still in the "discretion of the trial court" whether to admit it or not. Id. Obviously, Judge Newman exercised his discretion to admit or deny admission of the State's rebuttal or reply testimony, and he chose the former. There is no merit to this issue.

Further, the testimony of the expert only became relevant and probative when Prather took the stand and alleged he did not kill the victim or pose, carve, or cover-up the victim's body. Prather alleged he only hit the victim three (3) times and left the house, but the victim was still alive. Prather alleged in his trial testimony that it had to have been Phillips who committed the murder, as he [Prather] left the house and got in his car, and Phillips remained in the home for 8 to 10 minutes and must have carved "rapist" in the victim's back-side, placed the dildo beside the victim's shoulder, and then covered up the victim with a blanket.¹³ As a result, the expert testimony contradicted Prather and was proper reply. Todd; South; Stewart.

Prather further argues LaRosa's testimony should not have been allowed because it was not scientifically valid. For support of this proposition, Prather relies on scholarly articles and selected federal case law applying the Daubert factors for the admission of scientific evidence. This reasoning fails for two (2) main reasons.

First, all of Prather's authority applies the Daubert test—which South Carolina has never adopted as its standard for admission of scientific expert testimony. Instead, South Carolina follows State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) to assess the admissibility of expert scientific testimony.

¹³ Prather also argues the State should have offered LaRosa's testimony in its case in chief because Prather testified in his previous trial; and, as a result, the State knew he was going to testify again. There is no merit to this argument. A defendant does not have to testify in a retrial after a mistrial, nor can the prosecution be clairvoyant and know whether a defendant will chose to take the stand in a retrial several years after a mistrial.

In considering the admissibility of scientific evidence under the Jones standard, the Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

Council, citing State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Second, as many courts have pointed out, 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. Mil. App. 1992)(stating “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.).¹⁴ Prather’s contention LaRosa’s testimony was “unscientific” is completely correct; and it is this point which is fatal for Prather’s argument.¹⁵

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

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

“This language makes no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge. It makes clear that any such knowledge might become the subject

¹⁴ 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).

¹⁵ As Judge Newman correctly pointed out in his Order Denying the Motion for a New Trial, below both the State and Prather agreed, and Judge Newman found, the testimony offered by LaRosa was non-scientific in nature. (R. 982, Order Denying Motion for a New Trial, p. 12).

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 Agent 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, as indicated above, 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 next turns 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, Agent LaRosa did not offer profile evidence 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 Agent 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 two (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 Agent LaRosa's expertise in the area of crime scene analysis *and* his testimony in this case did not meet this criteria. Agent 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; (2) the staging was undone by someone; and (3) there were two (2) different persons or personalities involved in the murder, i.e. one who staged the crime scene and one who undid or covered up the staging, which is also contrary to Prather's trial testimony.¹⁶

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

¹⁶ Prather's argument overlooks that similar testimony in the area of crime scene analysis, and even profiling, was used to overturn the conviction and death sentence for a capital inmate in State v. Spann, 334 S.C. 618, 621-22, 513 S.E.2 98, 100 (1999). Everyone is familiar with the old saying, "what is sauce for the goose is sauce for the gander." Basic principles of fairness call for the prosecution to be able to introduce similar evidence under same evidentiary rules to show the jury the truth, i.e. that the defense' version or theory is false.

fact.]” Simmons v. State, 797 So.2d 1134, 1156 (Ala. Crim. App. 1999) *quoting* United States v. deSoto, 885 F.2d 354, 359 (7th Cir. 1989). In light of the grotesqueness of the crime scene, and the condition of the victim’s body, the trial court 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. 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 Agent LaRosa testified previously as an expert. Judge Newman also found as reliable that two (2) distinct, separate, and opposing emotions are shown in “staging” and “undoing.” Finally, Judge Newman found Agent 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.

Finally, Prather argues 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 state of mind or guilt or testify on matters of law . . .” Id. (emphasis added). He merely opined on the potential personality of whoever may have committed 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 committed the crime and what personalities they may have possessed. 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 rebuttal or reply testimony.

Even assuming *arguendo* the admission of this reply testimony was erroneous, its admission was harmless. The focus of this analysis is “whether beyond a reasonable doubt the trial error did not contribute to a guilty verdict.” State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). The Supreme Court mentioned a number of factors to be considered in determining whether an error is harmless:

the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution’s case.

Delaware v. Van Arsdall, 475 U.S. 673, 684, (1986); *see also* State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). Applying these factors, any error would be harmless. Prather’s statements to both the hospital staff and police that he assaulted the victim (i.e. he struck the victim with

"devastating blows", the victim was alive, but just barely, and he needed to wash the victim's blood off his hands) corroborated the evidence found at the scene and the autopsy. The stolen items found in Prather's vehicle and on Phillips, the blood (DNA) found on Prather's sock and the back of his shirt, and the knife found in Prather's car also corroborated two (2) people were involved in this murder, not just one (1), and this crime was motivated by robbery not Prather's claim of a sexual assault on Phillips. This reply evidence was also subject to rigorous cross-examination by Prather, leading to favorable testimony from this witness who admitted he could not say Prather staged the crime scene or carved the word "rapist" on the victim's back. Judge Newman also instructed the jury they were to determine the credibility of any expert witness testimony just as they did a lay witness. The jury was the judge of the credibility of Prather and LaRosa in reply. Prather's trial testimony was impeached several times when he alleged he either did not make statements testified to by the E.R. nurse or police, or his version of events had changed at trial. As a result, the admission of this testimony, was harmless beyond a reasonable doubt. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012).

Argument II.

Judge Newman did not abuse his discretion in admitting LaRosa's testimony because there was no discovery violation.

Prather argues Judge Newman abused his discretion when he allowed LaRosa's testimony because it was not produced in discovery pursuant to SCRCr.P., Rule 5, or Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). There is absolutely no merit to this argument.

This issue is not preserved for appellate review. This objection was not raised to Judge Newman during the *in camera* hearing or when the evidence was introduced before the jury. It was not raised until Prather raised it in his post-trial motion for a new trial. As a result, it is not

preserved for appellate review. King, supra (a new trial motion may not be used to raise an evidentiary issue for the first time); Kelly, supra, citing Holmes; McGee v. Bruce Hosp. Sys.

Further, there is no factual or legal merit to this ground. This is not a Rule 5 issue since LaRosa issued no discoverable report. Rule 5, SCRCr.P. Further, his name as part of the witness list for the State was not required to be given to the defense since he was to be called only in the event Prather took the stand, i.e. he was a reply witness. The defense had an opportunity to cross-examine LaRosa both in the *in camera* hearing and during testimony in front of the jury. The defense also had opportunity to request the Court to allow the defense to present surrebuttal testimony. However, the defense made no request. See State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005)(defendant not entitled to suppression or continuance to get his own expert where the State called the expert to testify about general characteristics of sex abuse victims; informing the defense of this witness before the trial was just professional courtesy).

Finally, non-disclosure of LaRosa's testimony prior to his calling in reply was not a Brady violation. The State has a duty to disclose evidence that is *favorable to the defendant*. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 ("the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."). A defendant asserting a Brady violation must demonstrate the evidence the State failed to disclose was favorable to the defendant [i.e. *exculpatory*], in possession of or known to the State, suppressed by the State, and material to guilt or punishment. See Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Prather cannot show a Brady violation because LaRosa's testimony was not *exculpatory* and was limited to only the staging of the crime scene as regards to how many perpetrators committed the crime. He offered no testimony directly stating he

believed Prather and or Phillips were guilty of the murder. Therefore, his testimony was **not exculpatory** nor was it directly incriminating and, not a due process violation under Brady.

Furthermore, the failure to provide Agent LaRosa's name would be harmless. *See State v. Miller*, 289 S.C. 316, 345 S.E.2d 489 (1986)(where parties were ordered to exchange lists and the State called a witness not on the list, the Court found the error was harmless).

Argument III.

The State did not commit prosecutorial misconduct by allegedly "sandbagging."

Prather further argues the State committed prosecutorial misconduct and violated Prather's right to due process, when it *allegedly* "sandbagged" the defense with Larosa's reply or rebuttal testimony. There is no merit to this ground.

This issue is not preserved for appellate review. Prather did not raise this issue at the time the evidence was offered in the *in camera* hearing or before the jury. This issue was not raised until a post-trial motion for a new trial. As a result, this issue is not preserved for appellate review. King, (a new trial motion may not be used to raise an evidentiary issue for the first time); Kelly, *citing Holmes*; McGee v. Bruce Hosp. Sys..

Further, the testimony did not constitute "sandbagging" as it was offered to rebut Prather's contentions in his testimony only one (1) person committed the murder, Phillips, and Prather's timeline and claim he was not involved. Furthermore, unlike in Coreas v. United States, 565 A.2d 594 (D.C. App. 1989), the State did not offer LaRosa's testimony in reply in order to present a new theory of the case. The rebuttal testimony served to rebut the arguments of Prather through his testimony and were wholly consistent with State's theory of the murder, presented in its case-in-chief. Prather similarly misuses United States v. Cannon, 88 F.3d 1495, 1503 (8th Cir. 1996), a case in which the court reversed on prejudicial statements made in the

State's closing arguments—completely unlike the present case. A similarly unrelated situation is presented in Wallis v. State, 546 S.W.2d 244 (Tenn. Crim. App. 1976), in which the court disallowed the defense from presenting a closing argument.

All of Prather's case law points to a procedural error not presented in this case. These cases present issues where the State offered new evidence or theories of the case in their closing arguments and did not allow the defense to rebut it in any way. These cases are not analogous to the present case in which State was merely presenting reply testimony which the defense had opportunity to both cross-examine and to present a motion for *surrebutal*. Further, the defense had the opportunity to argue against the interpretation offered by LaRosa in its closing argument, unlike the cases cited by Prather. Prather cites no South Carolina case law to support his contention. This appellate ground has no merit and must be denied and dismissed.

Argument IV.

Judge Newman did not err in admitting in evidence the fact that Phillips spelled the word rapist "rapeist" because the fact that Phillips misspelled the word was relevant, was not hearsay, did not violate the Confrontation Clause, and its prejudicial effect did not substantially outweigh its probative value.

How the Issue arose below.

As previously stated, the word "rapist" had been etched in the victim's back. At trial, in a *in camera* hearing, the State sought to introduce in evidence the fact Prather's co-defendant, Phillips, misspelled the word rapist ["rapeist"] when talking to police. Prather objected to the admissibility of the misspelling of the word "rapist" on confrontation clause grounds and because the testimony was allegedly highly prejudicial. *In the hearing*, the State offered a six-page statement written by Phillips describing the death of the victim. Captain Mark Jones of the West Columbia Police observed Phillips write this statement. Jones did not direct Phillips to write the statement nor did he dictate anything to Phillips for him to write. On page three (3) of

the statement, Phillips describes how Prather carved the word "rapist" on the victim's back-side. In describing this event, Phillips wrote the word "rapist" twice. However, he misspelled the word on both occasions, spelling the word "r-a-p-e-i-s-t." The State viewed this misspelling as significant and relevant because the word carved on the victim's back was spelled correctly "r-a-p-i-s-t." The statement of Phillips also included other misspellings. For example, on page three (3), Phillips spelled "torturing" as "t-o-r-c-h-e-r-i-n-g" and "pretense" as "p-r-e-t-i-n-c-e."

Notably, the State informed the Court in the *in-camera* hearing it did not intend to introduce the statement of the co-defendant Phillips, nor did it introduce the six-page written statement as evidence before the jury, nor was it ever referenced during the trial. The State cut the words "rapeist" from a copy of the statement, enlarged them, and offered them as exhibits.

During the trial, the testimony offered by Captain Jones was limited. He testified he recognized the two (2) cutouts of the word "rapeist" as words Phillips wrote in his presence. He acknowledged Phillips was under arrest at the time, but he never mentioned anything about Phillips writing a statement. Jones testified he did not ask Phillips to write, or tell him how to spell, the word "rapist," and he did not ask Phillips how he spells the word. He testified that the misspelling was important because the word carved on the victim was spelled correctly.

On cross-examination, Jones testified he never told Phillips the importance of the word "rapist." He admitted he did not know if Phillips intentionally misspelled the word. In addition, Prather introduced a photograph of coins and bullets stolen from the victim and found on Phillips at the hospital after the victim was killed, suggesting to the jury Phillips was the killer.

Prather raised similar issues regarding the word "rapeist" in his Motion for a New Trial. After hearing arguments from both parties in the *in camera* hearing, Judge Newman held the two (2) exhibits (R. 1049 & 1050, State's 24 & 25) of Phillips' misspelling of the word "rapist" were

admissible. In ruling on the Motion for a New Trial, Judge Newman also found he did not abuse his discretion in admitting the two (2) exhibits as the word was not a hearsay statement and was not a testimonial statement subject to the Confrontation Clause of the Constitution, and the statement was properly redacted. In addition, Judge Newman found he did not abuse his discretion by allowing Jones to testify to his observation of Phillips writing the word "rapeist." (R. 974, Order, p. 4).

Judge Newman found the evidence was not hearsay because it was not offered to prove the truth of the matter asserted, i.e. rapeist, but that Phillips could not properly spell the word rapist correctly, when the word was carved into the victim's buttocks spelled correctly, i.e. rapist.

Prather contends Judge Newman abused his discretion by allowing the State to introduce alleged co-defendant hearsay because (1) it was inadmissible under the SCRE, (2) it was unreliable, (3) it was irrelevant, and (4) its admission violated Prather's right to confront the witnesses against him. There is no merit to this argument.

First, Prather's arguments the evidence was unreliable, irrelevant, and inadmissible generally under the South Carolina Rules of Evidence are not preserved for appellate review. These issues were not raised to the trial court when the evidence was sought to be admitted or admitted during the trial as discussed above. (R. 298-311).¹⁷ As a result, these issues are not preserved for appellate review. King, (a new trial motion may not be used to raise an evidentiary issue for the first time); Kelly, citing Holmes; McGee v. Bruce Hosp. Sys..

Furthermore, there is no merit to Prather's arguments. In this case, there were two (2) people charged with murder. The misspelled word "rapeist" was clearly significant, relevant, and probative because the word carved on the victim's back was spelled correctly. Phillips

¹⁷ Prather concedes in his brief, an objection to relevancy was not raised at trial. And, it was only addressed by Judge Newman's Order denying the Motion for a New Trial. (IBOA, p. 24.

misspelled the word twice, in the presence of a police officer. The inference from this evidence is Phillips did not know how to correctly spell the word rapist. This evidence implicates Prather as being involved in the carving of the word on the victim's back, either as directly making the carving or directing Phillips how to carve the word. As a result, Prather's argument the evidence was not relevant has no merit. Rule 401, SCRE (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.").

Second, the fact Phillips misspelled the word rapist "rapeist" does not constitute hearsay, as the word in the context in which State presented it lacked a communicative value. Rule 801(c), SCRE, defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." If a statement is not offered to prove the truth of the matter asserted, it is not hearsay and is admissible. *See State v. Lewis*, 293 S.C. 107, 359 S.E.2d 66 (1987). In *State v. Johnson*, 324 S.C. 38, 476 S.E.2d 681 (1996), a witness testified about a verbal altercation resulting in the defendant pulling out a pistol and shooting the victim. *See Id.*, at 41, 476 S.E.2d at 682. The witness testified immediately prior to the shooting he heard an unidentified person ask the defendant "you got a gun?" and the defendant responded "yeah, and I ain't scared to shoot." *Id.* at 41, 476 S.E.2d at 682. The defendant objected on hearsay grounds. *See Id.* at 41, 476 S.E.2d at 682. The Court held "you got a gun" was not hearsay as it was not offered to prove the truth of the matter asserted. *Id.* at 42, 476 S.E.2d at 683.¹⁸ The mis-spelled word "rapeist" was not an assertion under SCRE Rule 801(a). Out of context of the sentence in which Phillips wrote the

¹⁸ Further, the Court found the statement was not even an assertion, but was a question asked to appellant. *See Id.* at 42, 476 S.E.2d at 683.

word, it lacks any assertive value and serves as merely an example of Phillips' spelling acumen, nothing more. The fact the word was taken from a statement written by Phillips is irrelevant. The statement in its entirety would certainly constitute his assertion of what really happened and who was truly responsible for the victim's death; however, the statement was never introduced at trial before the jury.

By taking the misspelled word "rapeist" from Phillips' statement, the State separated the word from any assertion made by Phillips. The word "rapeist" does not say anything about what transpired or who killed the victim. The State's theory the misspelled word "rapeist" is evidence Prather, not Phillips, carved "rapist" on the victim's back or directed Phillips to carve rapist, does not change this analysis. The misspelled word "rapeist" is not hearsay. Likewise, Jones' testimony was not hearsay. He testified to his observations and the significance he attributed to the misspelling. He did not testify about Phillips' version of events.¹⁹

Having, properly determined the misspelled word "rapeist" was not hearsay, the Confrontation Clause does not apply. However, even assuming *arguendo* the misspelled word "rapeist" is hearsay, Prather's objection still fails. In this case, the purpose of admitting the misspelled word "rapeist" was not for the purpose of introducing Phillips' version of events. The word, standing alone, in no way reflects the version of events written by Phillips in his six-page statement. There is no accusation against Prather. The State introduced the misspelled word

¹⁹ What's more, the word "rapeist" could potentially qualify as an exception under SCRE Rule 803(3) as a statement of Phillips' then existing state of mind—lack of an ability to properly spell "rapist". Furthermore, since the officer merely testified to seeing Phillips write "rapeist" and then the jury was shown the word to prove the officer's assertion, this likely falls under the exception described in *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (2007). Like the officer in the present case, in *Rice*, "Officer Smith did not testify as to what someone told him. He simply related what he learned as a result of his investigation." The Court goes on: "[t]he hearsay rule does not require exclusion of testimony about what an investigating officer learns from his investigation"—in this case, that Phillips could not correctly spell "rapist."

"rapeist" because of the independent evidentiary value it had apart from Phillips' statement. The word, on its own, can be compared to a handwriting exemplar.²⁰ In this case, Prather was able to confront and cross examine the witness against him. That witness was Jones, who testified as to his observations, and Prather vigorously cross-examined him.

Also, Judge Newman gleaned guidance from authority regarding the redaction of statements written by non-testifying co-defendants. When dealing with statements of non-testifying co-defendants, the Supreme Court does not take a position that would unjustifiably shackle the state in presenting an admissible confession. See State v. Evans, 316 S.C. 303, 450 S.E.2d 47 (1994). In cases where a co-defendant's version of the facts would otherwise be admissible, to require the State to redact completely anything that could be viewed in combination with other evidence as a reference or allusion to the defendant, would "unduly handcuff the government's ability to introduce admissible confessions and statements against a declarant in a joint trial." Id. at 307, n. 2, 450 S.E.2d at 50 n. 2 (where co-defendant's statement

²⁰ Handwriting exemplars are nontestimonial in nature and do not involve the 5th Amendment right against self-incrimination. See State v. Frasier, 341 S.C. 546, 534 S.E.2d 711 (Ct. App. 2000); Gilbert v. California, 388 U.S. 263 (1967). However, the 5th Amendment protects a handwriting exemplar by dictation where one incriminating aspect of exemplars was the spelling of a certain word by a defendant. See United States v. Matos, 990 F.Supp. 141 (E.D.N.Y. 1998). When a word is dictated, the spelling of that same word is testimonial because it is a result of the thought process of the defendant. See Id.; see also In re Grand Jury Subpoena to John Doe, 475 F.Supp.2d 1185 (M.D. Fla. 2006), *aff'd sub nom.*, In re Grand Jury Subpoena No. 2002r02810(163), No. 2005-01 to John Doe, 176 Fed. Appx. 72 (11th Cir. 2006); United States v. Kallstrom, 446 Supp. 2d 772 (E.D. Mich. 2006)(requiring the defendant to write a dictated statement will constitute a testimonial act because it involves an intellectual exercise in which the defendant will be quizzed on how to spell the dictated words); United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984)(recognizing when a defendant writes a dictated word, he is saying "this is how [he] spells it" – a testimonial message in addition to a physical display). By contrast, in this case, Jones did not dictate the word "rapist" to Phillips, nor did he ask him how to spell the word. Phillips voluntarily wrote a six-page statement that included a word that proved to be of independent evidentiary value. Similar to a handwriting exemplar not dictated, the misspelling of the word "rapeist" was not testimonial in nature. See United States v. Dionisio, 93 S.Ct. 764, 765 (1973).

he was not driving did not incriminate the defendant on its face was admissible, even though it was clear there were only two (2) people in the vehicle, the other was obviously the defendant).

In Bruton v. United States, 391 U.S. 123 (1968), the Court held a defendant's rights under the Confrontation Clause are violated by the admission of a non-testifying co-defendant's statement that expressly inculcates a defendant, even if a cautionary instruction is given. The Court, in Richardson v. Marsh, 481 U.S. 200 (1987), specifically declined to extend this rule to the situation when the defendant's name or any reference to the defendant is redacted, and held as long as a statement on its face does not incriminate the defendant, it can properly be admitted. If the misspelled word "rapeist" is considered an out-of-court statement, on its face it does not incriminate Prather. Prather's rights were not violated as the "statement" was **properly redacted**. This case was a case of redaction in the extreme. All six pages of the statement were redacted except for two words, rapist misspelled twice. There is no merit to Prather's argument.

Finally, Prather presents no specific case law to support the assertion the admission of the word "rapeist" was unreliable—other than Prather's bald assertion. It is the duty of the finder of fact to assess the credibility of the State's assertion. Determination of reliability of potential evidence is in the sound discretion of the court. Phillips misspelled other words besides rapist, including torturing and pretense. The evidence was reliable to show Phillips could not spell. Judge Newman did not abuse his discretion. There is no merit to this argument.

Finally, the misspelled word "rapeist" was admissible under Rule 403, SCRE. Pursuant to Rule 403, relevant admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. "Evidence is unfairly prejudicial if it has a undue tendency to suggest a decision

on a improper basis, such as an emotional one.” State v. Caldwell, 378 S.C. 268, 287, 662 S.E.2d 474, 484 (Ct. App. 2008)(citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). “A trial court’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” Id. at 547, 662 S.E.2d at 484 (citing State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004).

In this case, there were two (2) people charged with murder. The misspelled word “rapeist” by Phillips was clearly significant and probative because the word carved on the victim’s back was spelled correctly. This evidence implicates a second person and thus Prather as being involved in the carving of the word on the victim’s back, either as directly making the carving or directing Phillips how to carve the word.

The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. First, there is no unfair prejudice here. Second, if the jury did not believe the above inference from this evidence, then the evidence actually was beneficial to Prather, who claimed Phillips committed the murder and carved “rapist” into the victim’s body. Further, the manner in which this evidence was presented and the fact Prather was able to thoroughly cross-examine Jones substantially reduced any possible prejudicial effect of its admission. Jones admitted Phillips could have intentionally misspelled the word in Jones’ presence. The word was admissible because its probative value was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. As a result, this appellate ground has no merit.

Furthermore, “[i]n the event testimony is improperly admitted, the error is reversible only when the admission causes prejudice.” State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). “If Smith’s testimony constituted inadmissible hearsay, the admission was harmless. The information he provided only served to show Rice did not want her fingerprints taken. Nothing in

the record indicates the prints matched evidence found at the scene of the murder.” Id. The violation of a defendant’s right of confrontation, if proven, is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).²¹ Even if the testimony and admission of the word into evidence constituted hearsay, it was harmless error since, like in Price, the information only tended to prove Phillips could not spell “rapist.” It was completely in the jury’s province whether to take this inference to the next step and believe this circumstantially proved that Prather etched “rapist” into victim’s buttocks or directed Phillips to do so. Jones admitted on cross-examination Phillips could have intentionally misspelled the word twice.

Argument V.

Judge Newman did not err in denying the motion for a directed verdict.

Prather contends Judge Newman erred in denying his motion for a directed verdict because he *alleges* the evidence did not rise above a “mere suspicion” he proximately caused the decedent’s death. (BOA). There is no merit to this argument.

Standard of Review

A defendant may only appeal from a trial judge’s denial of a motion for a directed verdict of acquittal where there is a total failure of competent evidence tending to establish the charge laid in the indictment, and absent an error of law, the ruling must stand. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). In reviewing a denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Larmand, 2015 W.L. 4751033 (2015); State v. Rogers, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). This Court views the evidence *and all reasonable inferences* in the light most favorable to the State. State v. Thompson, 413 S.C. 90, 776 S.E.2d 413 (Ct. App. 2015); State v. Harry, 413 S.C. 534, 776

²¹ It is not *per se* reversible error. State v. Dinkins, 345 S.C. 412, 548 S.E.2d 217 (2001). See State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 815 (Ct. App. 1996); State v. Bell, 302 S.C. 18, 393 S.E.2d 362 (1990).

S.E.2d 387 (Ct. App. 2015). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 402 S.C. 119, 740 S.E.2d 493, 495 (2013). If there is any direct evidence, or if there is substantial circumstantial evidence, reasonably tending to prove the defendant's guilt, this Court must find the trial court properly submitted the case to the jury. State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015).

This Court considers only the existence or non-existence of evidence, not witness credibility, in reviewing the denial of a directed verdict. Rogers supra, n. 5, 748 S.E.2d 265, n. 5; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475 (2004). Our appellate courts have repeatedly held, where the evidence is circumstantial, the evidence will be considered as a whole, not in isolation, in determining whether there was sufficient evidence to submit the case to the fact finder. Rogers supra. If the State has presented any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013).²²

"The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 863 (Ct. App. 2005). On appeal, this Court is limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). An abuse of discretion occurs when a ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Moore, 374 S.C. 468, 649 S.E.2d 84 (Ct. App. 2007).

²² Further, when the defendant offers proof in his case in chief, the appellate court is to consider all of the evidence in ruling on whether a directed verdict motion at the close of the defendant's case was properly denied. See Hepburn, 406 S.C. at 429-42, 753 S.E.2d 402, adopting State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996); Cf. State v. Thompkins, 220 S.C. 523, 68 S.E.2d 465 (1951)(citation omitted).

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. Cherry, 361 S.C. at 593, 606 S.E.2d at 477-78. "Any concerns about contradictory statements by the accuser, whether on the stand or outside the courtroom setting, were ultimately about his credibility and therefore in the domain of the jury." State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005)(rejecting credibility as a factor in ruling on a motion for a directed verdict).²³ A trial court should grant the directed verdict motion when the evidence merely raises a suspicion the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. On the other hand, "a trial judge is not required to find that evidence infers guilt to the exclusion of any other reasonable hypothesis." Hepburn, 406 S.C. 416, 753 S.E.2d 402; Cherry. The trial judge is required to deny the motion for a directed verdict and submit the case to the jury if there is any direct evidence or any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which her guilt may be fairly and logically deduced. Hepburn, 406 S.C. at 429, 753 S.E.2d 402.

The Lack of Merit of Prather's' Argument

The State more than satisfied the standard to overcome the motion for a directed verdict on murder. Rogers, supra. Judge Newman appropriately denied the motion. Hepburn

"The defendant's act need not be the sole cause of the death provided that it be a proximate cause actually and contributing to the death of the deceased." State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990). In other words, "one ...is deemed to be guilty of the homicide if the injury inflicted contributes immediately to the death of the deceased. Id. at 498 (internal

²³ See also State v. Buckmon, 347 S.C. 324 n. 6, 555 S.E.2d 402, 406, n. 6 (2001)(witness credibility is not considered in a directed verdict motion); State v. Crawford, 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct. App. 2005)(a contradiction between a witness's "sworn statement to police and his later testimony in court is a matter of weight for the jury to decide.").

citations omitted). It was completely within the province of the jury to decide whether Prather was a proximate cause of the victim's death. Judge Newman did not abuse his discretion in denying the motion for a directed verdict.

The pathologist testified the victim died as a proximate result of the sum total of injuries he received in the beating in this case. The pathologist testified the victim did not die from his bad health or alcohol or drug intoxication, but from the beating that triggered a cardiac arrhythmia which caused the victim's heart to stop beating.²⁴ An investigating officer testified the crime scene was very bloody. Prather stated to the E.R. nurse he needed to wash blood off his hands, and laughed. Prather admitted to police and the E.R. nurse at the hospital that he severely beat the victim. He also admitted the victim was probably still alive *from his beating*, but just barely. The victim was in fact dead as a result of the beating Prather inflicted on him. Judge Newman and the jury did not have to believe Prather's later statement at the police station or his trial testimony, including the sequence of events.²⁵ The autopsy showed numerous injuries to the victim's body, including blows to the head, ribs, face, and a cigarette burn to the back of his finger, and the word "rapist" carved into his backside. (R. 339-52). When Prather was arrested, found in his possession was a pack of cigarettes containing five (5) cigarettes and a cigarette lighter. Found in the floorboard of Prather's car was a knife.

In the present case, Prather admitted at the E.R. he had assaulted the victim violently. He admitted to police he had hit the victim with devastating blows. The pathologist testified the

²⁴ Testimony was introduced at trial that the victim's alcohol and drug intoxication did not cause his death; and, in fact, given the victim's tolerance for alcohol, the amount of alcohol in his system would not have been fatal to the victim.

²⁵ In fact, Rabon directly contradicted Prather's sequence of events. Rabon testified that after the initial altercation between Phillips and the victim, the victim had consensual sex with Phillips, and then left his home with Prather. The owner of "Louie's" also confirmed the victim was with Prather drinking in the wee hours of the morning, and was intoxicated, and Prather was sober. He saw the two (2) men leave the bar in Prather's car with Prather driving.

victim died of cardiac arrest as a result of the beating he received. The victim's injuries were numerous including a broken nose, broken ribs, blows to the side of the head and face, blows to the body, and suffocation could not be ruled out as a contributing factor. Furthermore, the evidence showed Prather and Phillips stole items from the victim's residence after killing the victim. Judge Newman did not abuse his discretion in denying the directed verdict. Burton

Argument VI.

The State did not pursue inconsistent theories against co-defendants.

Prather next argues the state's actions in *allegedly* pursuing factually inconsistent theories in Prather's and Phillips' cases denied Prather his right to due process. This appellate issue is not preserved for appellate review. This issue was not raised to the trial court at trial or in Prather's post-trial motion. (See Order). It cannot now be raised on appeal. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1995); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000); Wilder Corp. v. Wilkie, 330 S.C. 71, 497 S.E.2d 731 (1998). As a result, this issue must be dismissed.

Further, there is no factual or legal merit to this ground. Prather has completely misrepresented the Record. Prather excerpts one (1) portion of co-defendant Phillips' guilty plea transcript and argues from this the State presented inconsistent theories against co-defendants; and, he is entitled to a new trial because his due process rights were violated. The entire record of Phillips' guilty plea and of Prather's trial shows the State did not pursue inconsistent theories. (R. 1004-1039, Tr. Dec. 5, 2012 & R. 1-870, Trial Transcript of Appellant).

In relation to this case, Phillips pled guilty on December 5, 2012 before Judge Knox McMahon to voluntary manslaughter and armed robbery, just a few days after Prather's convictions. During the State's recitation of the factual basis for Phillips' pleas, Deputy Solicitor Rick Hubbard informed Judge McMahon of *each* of the different statements Phillips had given

police and the Solicitor's Office about the murder of the victim *prior to the first (1st) trial of Prather in 2009*. (R. 1004-39, Tr., Dec. 5, 2012).

Deputy Solicitor Hubbard laid out details of each of those statements including Rhillip's last statement to police and prosecutors in which Phillips indicated he and Prather planned all along to rob the victim the night the victim was murdered.²⁶ Deputy Solicitor Hubbard made clear to Judge McMahon that police believed this last statement to be the closest to the real truth, but Hubbard also indicated to Judge McMahon that "we still don't know." Hubbard then informed Judge McMahon that the day following his last statement, Phillips contacted prosecutors and told them everything in his last statement was a false, and he was not cooperating with the State. Hubbard informed Judge McMahon that regardless of which statement was the truth, if any, in all of his statements Phillips implicated himself in the murder of victim. The record of Phillips' guilty plea transcript shows the State was not pursuing inconsistent theories but giving Judge McMahon a factual basis for Phillips' guilty pleas to **voluntary manslaughter** and **armed robbery** in the death of Gerald Stewart. (R. 1004-39). The record of the guilty plea also shows Hubbard indicated to the Court that if Phillips decided at any point during the plea he wished to withdraw the plea, then the State was prepared to go

²⁶ Hubbard informed Judge Newman that in this last statement Phillips detailed that Prather had been stealing from the victim for some period of time, and had even stolen guns from the victim's home on an earlier occasion. Phillips indicated that on the night of the murder, Prather had beaten the victim with a T.V. tray table and then positioned the victim's body as it was found by police. Phillips stated Prather told him [Phillips] to smother the victim with a pillow, which Phillips did. Phillips indicated Prather told him to carve the writing into the victim's buttocks, which he did. Phillips indicated he and Prather then stole items from the victim's home. Phillips indicated he and Prather left the victim's home and went to a pool hall, got their stories straight, and then reported the *alleged* rape at the hospital. Phillips indicated there was no rape or sexual assault, and he had not been drinking that night and had faked being passed out on the couch earlier in the evening. (R. 1004-39).

forward with the trial against him and introduce all of the evidence against him including his multiple statements. (R. 1004-39).

Similarly, at Prather's trial, the State contended both men were involved in the murder of the victim and the cover-up of the murder. The State did not call Phillips as a witness at Prather's trial and vouch for his statements, nor did Prather. The State's theories were not contradictory since the State presented at both Prather's trial and Phillips' guilty plea the theory that both men were directly involved in the murder. (R. 1-870, Trial Transcript of Appellant Prather & R. 1004-39; Guilty plea, Tr.). In fact, at Phillips' plea, Phillips admitted he was guilty under "the hand of one is the hand of all." (R. 1004-39, Guilty plea, Tr. pp. 1-36).

Prather argues he was unable to use the prosecutions' statements at Phillips' plea in arguing against the admission of evidence at his trial; and this violated due process because the prosecution took inconsistent positions. However, as the record shows, the prosecution did not take inconsistent positions as to the two (2) co-defendants. The record shows the State did not vouch for the credibility of any specific statement of Phillips' at his plea only that he had incriminated himself repeatedly and the State would use those statements against Phillips if he backed out of the plea and they were a sufficient factual basis for the guilty pleas. (R. 1004-39). Further the record shows Prather had received *Phillips' prior statements* prior to trial and could have offered them at trial in opposition to any evidence the State attempted to introduce or cross-examined the State's witnesses with them. (R. 750-51).²⁷ Finally, there was no obligation of the State to inform Judge Newman of the contents of Phillips numerous prior statements, which had been turned over to Prather, before seeking to admit evidence in Prather's trial.

²⁷ There is absolutely no evidence in the record the State did not turn over Phillips' prior statements made in 2009 or before, before Prather's trial in 2012.

This situation is analogous to Bradshaw v. Stumpf, 454 U.S. 175 (2005)(holding that “[t]he Court of Appeals was also wrong to hold that prosecutorial inconsistencies between the Stumpf and Wesley cases required voiding Stumpf’s guilty plea.”). Like in Stumpf where the Court held “the precise identity of the triggerman was immaterial to Stumpf’s conviction for aggravated murder,” the precise identity of the victim’s buttocks-etcher was immaterial to Prather’s or Phillips’ guilt or innocence for the murder of victim. This case is unlike shocking cases where two (2) defendants are independently tried and convicted for the same crime which could have been committed by only one (1) person. See Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997). Here, the State argued factually consistent cases against co-defendants.

Here, the record shows the prosecutor was relating to the plea/sentencing court in the co-defendant’s guilty plea what *police* believed, that Prather’s co-defendant’s last statement was the closest he had come to telling the truth about what had actually happened. As the prosecutor also pointed out to the plea/sentencing court, no one really knows the real truth, only the two (2) perpetrators; Prather and Phillips. Finally, at Prather’s trial the State contended either Prather carved “rapist” into the victim’s buttocks or the co-defendant did so at Prather’s direction. The theories are not inconsistent. There is no merit to this appellate ground. It must be dismissed.

Argument VII.

Judge Newman did not abuse his discretion in not admitting the written statement. *What Occurred Below*

During the defense’ case, Prather sought to introduce the written statement of an unavailable witness, Ralph Becknell (deceased), given to police, about the substance of a conversation Becknell had with the victim, Gerald Stewart (deceased), the evening before the victim’s murder. (R. 630-34, Def.’s Ex. 4 for I.D.). Prather contends Judge Newman abused his discretion, and he was denied due process, when the court denied admission of the *written*

statement of Becknell, when the statement was *allegedly* a present sense impression or excited utterance, and it would have corroborated Prather's defense he was not responsible for Stewart's death. There is absolutely no merit to this appellate issue.²⁸

"Whether a statement is admissible under the excited utterance exception to the hearsay rule depends on the circumstances of each case and the determination is generally left to the sound discretion of the trial court." State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999). There are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007). "Statements 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 rule against hearsay." State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006) (emphasis added).

This hearsay statement was properly not allowed because it was not based on firsthand information since the declarant was not an actual witness to the event—the altercation between the victim and Phillips, Davis; and also because Becknell's relaying of victim's alleged statement was not an "excited utterance" made while Becknell was under the stress of excitement caused by a startling event. See State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007).²⁹ What's more, this situation represents a case of two (2) layers of hearsay since victim was relaying the event to Becknell who then relayed it to police later. See State v. Hendricks, 408 S.C. 525, 759 S.E.2d

²⁸ The due process issue was not raised to Judge Newman below. It is not preserved.

²⁹ Even if Becknell immediately called police after the victim's call to him, he would not have been in a "stress of excitement . . . caused by [a] startling event" since he was not a witness to the event and was merely hearing about the so-called startling event from the victim after the fact.

434 (Ct. App. 2014). Therefore, the excited utterance exception would have to be satisfied first with the statement of the victim to Becknell, then with Becknell to police. It is obvious Becknell's statement does not meet the exception.³⁰ Judge Newman did not abuse his discretion.

Likewise, the statement does not meet the exception of a present sense impression. "There are three (3) elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (2014) *citing* United States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998).³¹ Regardless, it is inarguable the second level of hearsay meets at least one (1) prong of the present sense impression test. First, the statement Becknell made to police was not contemporaneous with the event, but it had

³⁰ It is also likely the victim's statement to Becknell does not meet the requirements of the exception since the statement lacked the requisite spontaneity. Prather is not able to prove "the nature of [his] reaction was such that it generated the spontaneity that gives an excited utterance its inherent reliability." *Id.* Further, Prather "did not show [the victim] was still under the required stress of excitement when [he] actually made [his] statement." *Id. citing Davis*, 371 S.C. at 180, 638 S.E.2d at 62 (finding the State elicited no evidence the declarant "was still under the stress or excitement of [the victim's] shooting," and "[t]herefore, the State did not meet its burden of establishing a foundation for the excited utterance"). Prather offered no evidence the victim was "shaking, crying, and distraught" when he made the statement to Becknell. *Id.* Also there was no reliable indication as to exactly how close in time was the confrontation between Phillips and the victim to when the victim called Becknell. A close proximity is essential to proving he was still "under the stress of excitement." *Ladner*, at 116 644 S.E.2d at 691. Finally, the record does not show, and Prather has not argued, the fight was of a sufficiently shocking nature to have caused the victim to give an excited utterance in the first place. *See Id., citing State v. Sims*, 348 S.C. 16, 22, 558 S.E.2d 518, 521 (2002) (noting the "declarant's demeanor . . . and the severity of the startling event" are factors a trial court should consider in determining whether a statement qualifies as an excited utterance).

³¹ It is uncontroverted that, as regards the victim's alleged transmission of this statement to Becknell, it passes the first and third prong of the test. The statement described the event of Phillips' and the victim's altercation. Likewise, it satisfies the third prong because victim not only perceived the event, he was at the epicenter of it. However, it is inarguable victim's statement satisfies the second prong as it is not clear from the record when, exactly, the victim and Phillips had the altercation and then when the victim called Becknell.

occurred sometime later. Second, the declarant, Becknell, did not witness the event. Therefore, the statement made by Becknell to police fails to meet the requirements of the present sense impression test at both levels of hearsay, rendering it inadmissible. Therefore, Judge Newman did not abuse his discretion by refusing to admit *Becknell's statement* to police.

Argument VIII.

Judge Newman did not err in denying the motion to suppress on Prather's car.

Finally, Prather argues Judge Newman erred when he did not suppress the *Coca-Cola* collector's box and knife found in his car. There is no merit to this argument.

What Occurred Below

Pretrial, Prather moved to suppress the fruits of the search of his car, found by police in the E.R. parking lot and towed after he was taken into custody, contending the search warrant for the vehicle was invalid. A suppression hearing was conducted. (R. 93-165).

At the hearing, the State admitted the car search warrant affidavit was facially deficient; however, the State showed through the testimony at the hearing the *Coca-Cola* collector's box was in plain view to the officer tasked to guard the vehicle until a search warrant could be obtained. Further, pursuant to the policies and procedures of the West Columbia Police Dept., the *Coca-Cola* collector's box and the knife would have been inevitably discovered through an inventory of the vehicle. Finally, the State showed through the testimony the Magistrate had probable cause to issue the search warrant for the car because the Magistrate issued the warrant within a few hours after issuing another search warrant in the case and had also received sworn oral testimony constituting sufficient probable cause. (R. 93-165).³²

³² At the suppression hearing, the State called not only the officer who observed the *Coca Cola* collector's box in plain view, but also the officer who obtained the warrant, and the officers who

Judge Newman properly denied the motion to suppress, because pursuant to State v. White, 275 S.C. 500, 272 S.C. 800 (1980), even though this affidavit was facially deficient, due to the fact that considering the other search warrant affidavit and sworn oral testimony presented to the Magistrate that same day regarding this very case, there was probable cause to issue the warrant. Further, Judge Newman found the *Coca-Cola* collector's box was observed in plain view by the officer tasked with maintaining custody of the car at the E.R. parking lot, and the evidence found in Prather's car would have been inevitably discovered pursuant to the inventory search exception to the warrant requirement of the Fourth Amendment. (R. 93-165).

Standard of Review

The standard of review of Fourth Amendment search or seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with the appellate court only being able to reverse the ruling of a trial judge where there is clear error. State v. Morris, 411 S.C. 571, 769 S.E.2d 854 (2015). Warrants are constitutionally preferred; and, in determining whether they should issue, magistrates are concerned with probabilities, not certainties. See State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). As a result, a reviewing appellate court gives great deference to a magistrate's determination of probable cause. See State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). When determining the propriety of the issuance of a warrant, the duty of this Court is simply to determine whether the magistrate had a substantial basis for concluding probable cause existed. State v. Kinloch, 410 S.C. 612, 767 S.E.2d 253 (2014). In making such a decision, this Court must consider the totality of the circumstances. Jones, supra (under this test, a reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, when obtained another search warrant in this case the same day, and the Magistrate who issued both search warrants. (R. 93-165)

determining whether or not probable cause existed).³³ However, all that is necessary for the issuance of a warrant is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), "The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495-96 (2009).

Further, a warrant affidavit may be supplemented by sworn oral testimony before the magistrate. S.C. Code Ann. Section 22-3-710; Law v. S.C. Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006). "[A] warrant affidavit which is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony." State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990) citing State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988).³⁴

The Lack of Merit of Prather's Argument

The threefold purpose of the warrant requirement is to provide the safeguard of detached judicial scrutiny prior to the issuance of the warrant; to keep lawfully initiated searches within

³³ The magistrate should determine probable cause based on all of the information available to him at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996). In determining the validity of a warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001).

³⁴ See also State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987); State v. Gore, 408 S.C. 237, 246, 758 S.E.2d 717, 721 (Ct. App. 2014) "[o]ral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause."; State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007); State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999).

proper bounds; and to assure the individual of the lawful authority of the officer executing the search, his need to search and the limits of his power. State v. White, 275 S.C. 500, 272 S.C. 800 (1980). In White, the Court recognized a warrant affidavit submitted in support of a search warrant failed to establish probable cause; however, the affidavit for the arrest warrant was also before the magistrate at the time. Id. The Court found that facts supplied by two affidavits simultaneously filed and considered by the magistrate could be taken into account by him in determining the existence of probable cause for the search warrant. Id.; citing United States v. Nolan, 413 F.2d 850 (6th Cir. 1969); United States v. Bozza, 365 F.2d 206 (2nd Cir. 1966); Blankenship v. State, 258 Ark. 535, 527 S.W.2d 636 (1975); State v. Kalai, 56 Haw. 366, 537 P.2d 8 (1975); State v. Smith, 295 Minn 65, 203 N.W.2d 348 (1972). The White Court noted:

Our primary concern is that the magistrate is sufficiently informed to make an independent determination of probable cause. A search warrant issued upon affidavit or affirmation does not offend the constitution. State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975). Any information relied upon to establish probable cause must be in the words of the Fourth Amendment, 'upon probable cause supported by oath or affirmation.' We held in Sachs, *supra*, that an affidavit could be supplemented by oral testimony. We now hold it is permissible to construe separate affidavits, obtained simultaneously in order to determine the existence of probable cause. There is no inherent defect in utilizing multiple affidavits State v. Gamage, 340 A.2d 1 (Me. 1975); People v. Close, 60 Ill. App. 477, 208 N.E.2d 644 (1965). We concluded the magistrate correctly issued the search warrant.

White, 275 S.C. at 502-03. Other courts have followed our Supreme Court's lead in White. Derr v. Commonwealth, 242 Va. 413, 410 S.E.2d 662 (1991)('we now hold that an 'affidavit may be supplemented or rehabilitated' with additional affidavits which contain collective facts relevant to the same offenses when those affidavits are presented, simultaneously, to the issuing magistrate by the same officer) citing White; and Tucker v. State, 403 So.2d 1274, 1278 (Miss. 1981). Similarly, this has been extended to multiple affidavits involving the same criminal investigation submitted to the same magistrate on the same day. United States v. Scrao, 367 F.2d

347, 350 (2d Cir. 1966), *vacated and remanded on other grounds sub nom, Piccioli v. United States*, 390 U.S. 202 (1968), *indictment dismissed on remand*, 394 F.2d 989 (2d Cir. 1968). In Serao, the Court held:

It would be hypertechnical for the Commissioner [magistrate] not to act upon an entire picture disclosed to him in interrelated affidavits presented to him on the same day. And, as the United States Supreme Court admonished in United States v. Ventresca, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965), "the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than commonsense, manner.

Id. at 367 F.2d at 350. The Courts of Appeal for the 9th and 6th Circuits found similarly in United States v. Fogerty, 663 F.2d 928, 930 (9th Cir. 1981) and United States v. Manufacturers National Bank of Detroit, 536 F.2d 699, 702 (6th Cir. 1976)("[i]t would needlessly restrict the discretion of a magistrate to hold that two affidavits filed so close in time and referring to a single criminal investigation which was still continuing could not be considered together in determining whether to authorize a further search."). The Tennessee Court of Criminal Appeals held similarly. State v. Smith, 836 S.W.2d 137 (Tenn. Crim. App. 1992)(citing White).

Considering all of the sworn testimony presented to the very same Magistrate on the very same day regarding the very same crimes; the Magistrate in this case had a substantial basis for determining probable cause existed to issue the search warrant for Prather's car. The Magistrate knew of the murder earlier in the day through the issuance of the search warrant for the victim's residence. The Magistrate knew through sworn oral testimony this car belonged to Prather and transported the individuals to the hospital who stated they had beaten the victim, and that the Coca Cola box was seen in plain view and was connected to the crime scene. Judge Newman did not abuse his discretion, and there is evidence in the record to support his determination. (R. 93-165).

Further, the evidence found in Prather's car is subject to the "inevitable discovery" exception to the exclusionary rule since, as stated by the police and Judge Newman, the evidence would have been discovered independently of the deficient affidavit pursuant to the police's impound and inventory policy. (R. 93-165, 1042-43 State's Ex. 3, 4). See Nix v. Williams, 467 U.S. 431 (1984).³⁵ In the present case, the State not only cured the inadequacies of the deficient affidavit with the supplemental testimony by police stating further grounds for the search of Prather's car; but the State also made the showing of inevitability of discovery of the contents of the car by providing testimony concerning the police departments' impounding and inventorying policy. (R. 93-165, 1042 & 1043 State's Ex. State's Ex. 3 & 4). State v. Boyd, 288 S.C. 206, 341 S.E.2d 144 (Ct. App. 1986)(an "inventory search" is permissible where police intrusion into vehicles impounded or otherwise in lawful police custody is based on securing or protecting the vehicle and its contents). Prather was taken into custody at the E.R. and transported to the police department. His vehicle would have been impounded and inventoried in any event. Therefore, Judge Newman did not err by denying Prather's request to exclude this evidence.

Further, even if Judge Newman erred, the exclusionary rule should not apply. The exclusionary rule should only apply as a last resort, and only after balancing the deterrence value verses the societal costs, and only when there is flagrant police misconduct. Davis v. United States, 131 S.Ct. 2419 (2011).³⁶ In this case, exclusion would not further the purposes of the

³⁵ "The inevitable discovery doctrine, an exception to the exclusionary rule, states if the prosecution can establish by a preponderance of the evidence the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained." See State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (2011) citing Nix, 467 U.S. at 444.

³⁶ See Herring v. United States, 555 U.S. 135 (2009); Hudson v. Michigan, 547 U.S. 586 (2006); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012); State v. Weston, 329 S.C. 287, 293 494 S.E.2d 801, 804 (1997); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471 473 (1987); State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324 (Ct. App. 2011). Police practices

exclusionary rule, and suppression is not proper. Id.; State v. Harvin, 343 S.C. 190, 194, 547 S.E.2d 497, 500 (2001)(main purpose of exclusionary rule is deterrence of police misconduct).

Further, the admission of this evidence was harmless on the murder charge given all of the evidence of Prather's guilt including his statements to police and the nurse at the hospital, the victim's blood (D.N.A.) on his clothing, Rabon's testimony, and the impeachment of his trial testimony. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

CONCLUSION

For the above stated reasons, Prather's convictions and sentences must be affirmed.

Respectfully submitted,



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March 7, 2016

trigger the harsh sanction of exclusion only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system. Davis; Herring, 555 U.S. at 144. The conduct of the officers here was neither of these.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Respondent,

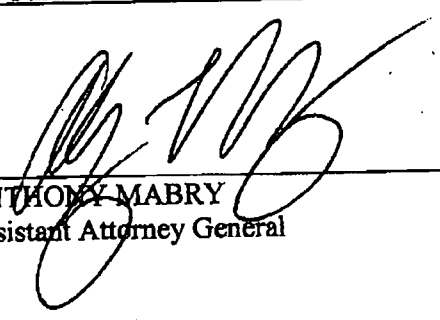
vs.

ROBERT JARED PRATHER,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



ANTHONY MABRY
Assistant Attorney General

March 7, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

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THE STATE,

Respondent,

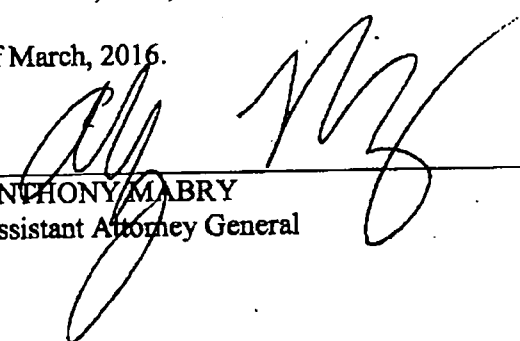
vs.

ROBERT JARED PRATHER,

Appellant.

CERTIFICATE OF SERVICE

I Anthony Mabry, hereby certify that I have served the Final Brief of Respondent in the foregoing action by depositing two copies of same in the United States Mail to Elizabeth Franklin-Best, Esquire, Blume Norris & Franklin-Best, LLC, 900 Elmwood Avenue, Suite 200, Columbia, South Carolina 29201 this 7th day of March, 2016.



ANTHONY MABRY
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

Appeal From Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 5514
Heard April 11, 2017 – Filed September 6, 2017

REVERSED AND REMANDED

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

Attorney General Alan McCrory Wilson, 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.

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.¹ 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."

¹ 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."²

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 fight broke up, but when they came back inside Phillips hit Victim twice again

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

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*,³ 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.

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

³ 382 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").

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).

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.⁴ He did not testify to any of the conduct surrounding these events.

⁴ We are not convinced by the dissent's citation to the following testimony that Prather testified Phillips committed the crime alone, regardless of what the jury may have inferred from it.

[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

He did not testify they happened in a specific manner or for a specific reason but simply denied doing them. Such broad expert testimony on reply "explain[ing] the crime scene" could not reasonably be anticipated by Prather. 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

inside. The remaining testimony cited by the dissent is a basic denial of the crime. Additionally, the record demonstrates Victim's roommate was also in the house at the time of the crime—a fact Prather acknowledged on cross-examination:

[State]: That [Phillips] goes back in, correct?

[Prather]: Yes.

[State]: That [Phillips] must be the one that carved rapist?

[Prather]: Yes, but there's also someone else in the house.

[State]: So now you think Mr. Rabon did it?

[Prather]: I don't know who did it sir.

requires us not to question whether the State proved its case beyond a reasonable 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 Prather's prior statements 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.⁵ 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.

⁵ Prather also contends LaRosa's expert testimony was not sufficiently reliable under *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). 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.

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. State of Fla.*, 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.⁶

REVERSED AND REMANDED.

LEE, A.J., concurs.

WILLIAMS, J., dissenting.

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

⁶ 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).

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.

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. Through his testimony, Prather inferred that only one person committed these acts.⁷ Conversely, the State's reply testimony contradicted Prather's notion

⁷ 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.

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."⁸ Accordingly, I do not

[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?

[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.

⁸ 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 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

find that the circuit court abused 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 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

taking blankets and wanting to erase, to just
undo what has just occurred.

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.⁹ 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

⁹ The majority did not address these issues because its holding was dispositive.

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 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.¹⁰ 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

¹⁰ Phillips spelled the word "rapeist."

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.

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.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Petitioner,

vs.

ROBERT JARED PRATHER,

Respondent.

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

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ATTORNEYS FOR PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

The testimony of LaRosa was no different. As Prather conceded in his brief, the testimony of LaRosa directly contradicted his trial testimony. (Final Brief of Appellant, p. 11). It "...contradicted Prather's testimony that he was not involved in, nor did he witness, any carving of the word "rapist" on Stewart and had no knowledge as to Stewart's being covered in a blanket. It also contradicted Prather's testimony that he left Phillips in the house alone with the decedent. In short, it was offered to impeach Prather's version of events regarding 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).

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

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

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

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

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

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

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

[State] That [Phillips] goes back in?

[Prather]: Yes.

[State]: That [Phillips] must be the one that carved rapist?

[Prather]: Yes, but there's also someone else in the house?

[State]: So now you think Mr. Rabon did it?

[Prather]: I don't know who did it sir.

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

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

Q: When y'all get back, Ron Rabon goes to bed; correct?

A: Right.

Q: Did you see him anymore?

A: No.

Q: He's done?

A: Yeah.

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

Q: When you come out and sit in that car, there's only two people in that house at that point, other than Mr. Stewart. That's Ronald Rabon in that back bedroom who you've never heard anymore from that night; right?

A: Right.

Q: And your acquaintance, Joshua Phillips; right?

A: Yes, sir.

Q: You sit in the car eight to ten minutes and then he [Phillips] comes out and joins you; is that correct?

A. Yes.

Q: And that's when y'all take off?

A: Yes, sir.

(R. 714, ll. 19 – 715, ln. 5).

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

A: No, I'm not.

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

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

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

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

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

A: Okay.

Q: You'd agree?

A: I would agree.

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

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

Q: R, you see that R?

A: Yes, I see that R.

Q: You see an A?

A: Okay.

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

A: Yeah.

Q: You see that I right here?

A: Yeah.

Q: Do you see the S?

A: Is that an S?

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

A: Uh, yeah.

Q: Do you see the T?

A: Yes.

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

A: Yes, sir.

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

A: No, sir.

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

A: No.

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

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

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

A: The cigarette burn?

Q: The cigarette burn?

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

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

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

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

A: No.

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

A: Somewhere around there.

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

A: I would agree.

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

A: Completely.

Q: It's depraved; correct?

A: Yes.

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

A: Yes, I have.

Q: Who said that?

A: I'm not quite sure.

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

A: (Nods affirmatively)

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

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

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

A: I would say it did.

Q: That monster won, didn't it?

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

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

A: Unfortunately, yes, sir.

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

A: Yes.

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

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

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

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

Q: So you were put in this situation?

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

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

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

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

A: I saw pictures of that as well.

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

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

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

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

Q: I'm asking you?

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

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

A: No.

Q: The money doesn't have an address?

A: No.

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

A: I would assume.

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

A: In the passenger's seat floorboard.

Q: In your car?

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

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

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

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

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

A: No, sir.

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

A: No, sir.

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

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

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

A: No, sir.

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

A: No sir.

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

A: No.

Q: Did *you* carve him?

A: No

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

A: No.

Q: Did *you* murder him?

A: No, I didn't.

Q: Did *you* kill him?

A: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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, p. 24, & n. 6).

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

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

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

The State established the following regarding the knowledge, skill, experience, training, and education of LaRosa as it relates to crime scene analysis: He had been employed by the State Law Enforcement Division for 18 years; from 1994-2000 as a Special Agent in the crime scene unit collecting and processing evidence, and analyzing and reconstructing crime scenes based on the evidence; from 2005-10 as a violent crimes investigator; and from 2010-12 as a behavioral analyst assigned to the behavioral science unit. As a behavioral analyst, he studied under and is currently working with 2 qualified crime scene 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 reconstruction⁸ indicating the person who committed the crime altered the crime scene in order to misdirect law enforcement and hide the truth. He opined the carving of the word "rapist" into the victim's back was evidence of staging. The superficial nature of the carvings supported his belief the scene was staged as compared to directed or real anger he would expect to see from an actual rape. The lack of evidence of real anger, such as deeper carvings, or anger directed towards the instrument of the rape, such as injury to the penis or mouth supported his opinion of staging. Additionally, staging was also evidenced in the positioning of the body and in the placement of a dildo beside the victim's body; the victim was found on his knees face down on the sofa; there was no sign or evidence the dildo was used in any manner or had anything to do with the murder. The staging in this case indicated the personality in the crime scene at the time wanted to misdirect law enforcement towards the idea the victim was a rapist. LaRosa further opined the crime-scene showed evidence of "undoing."

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

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

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

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

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

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

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

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

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

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

Finally, Prather argued LaRosa’s testimony improperly invaded the province of the jury as fact finder. This is clearly not accurate. “Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Rule 704, SCRE. “[S]o long as the expert does not opine on the criminal defendant’s state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant’s guilt or innocence.” State v. Commander, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011).

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

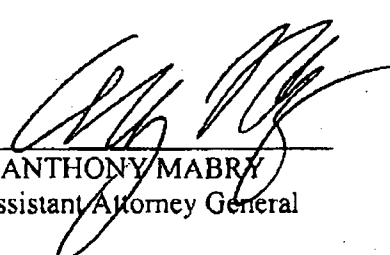
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September 21, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Respondent,

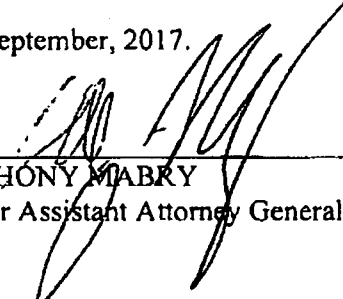
vs.

ROBERT JARED PRATHER,

Appellant.

CERTIFICATE OF SERVICE

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



ANTHONY MABRY
Senior Assistant Attorney General

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SC Court of Appeals

The South Carolina Court of Appeals

The State, Respondent,

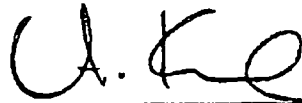
v.

Robert Jared Prather, Appellant.

Appellate Case No. 2014-001500

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

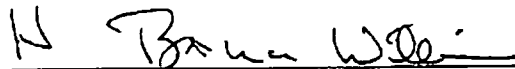


J.



A.J.

I agree to grant the rehearing. In light of the majority's substituted opinion, I adhere to my dissent, which is withdrawn and substituted.



J.

Columbia, South Carolina

cc:

Samuel R. Hubbard, III, Esquire

Alan McCrory Wilson, Esquire

Elizabeth Anne Franklin-Best, Esquire

FILED

Dec. 6, 2017

27

Donald J. Zelenka, Esquire
J. Anthony Mabry, Esquire
The Honorable Clifton Newman

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

The State, Respondent,

v.

Robert Jared Prather, Appellant.

Appellate Case No. 2014-001500

Appeal From Lexington County
Clifton Newman, Circuit Court Judge

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

REVERSED AND REMANDED

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.

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.¹ 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."

¹ 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."²

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

² 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*,³ 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.

³ 382 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.⁴ He did not testify to any of the conduct surrounding these events.

⁴ 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

"[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.⁵

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.

⁵ 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.⁶ Conversely, the

⁶ 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."⁷ Accordingly, I do not find that the circuit court abused

[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.

⁷ 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

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.⁸ 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

⁸ 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.⁹ 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.

⁹ 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.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Petitioner,

vs.

ROBERT JARED PRATHER,

Respondent.

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

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

Pursuant to Rules 219, 221, & 240 SCACR, Respondent the State of South Carolina petitions the Honorable Court of Appeals for Rehearing and suggests Rehearing En Banc as to this Court' substituted Opinion issued **December 6, 2017**.¹

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

¹ 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).²

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).

² 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).³ 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.

³ 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.⁴ 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

⁴ 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.⁵ 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

⁵ 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.⁶ 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

⁶ 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 (1st) brought into the facts surrounding the victim's murder by Prather ["Jerry"]. (R. 525, ll. 1-24). This is mentioned nowhere in the majority's opinion. Could this be where Prather first got the idea to "stage" the crime scene by carving "rapist" on the victim's buttocks? The majority overlooks this fact. This was for the jury to decide.

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

During the time Prather was gone, Rabon left his room and saw a **consensual sexual encounter** between "Ray" [Phillips] and the victim on the living room couch and in the victim's

bed. As a result, there was no rape or sexual assault of "Ray" [Phillips]. (R. 531-35, 543). The alleged sexual assault was a concoction by "Jerry" [Prather] and "Ray" [Phillips] after the fact. This would also explain why Phillips covered the victim with a blanket after the fact. Phillips knew there was no rape or sexual assault.

Rabon testified that after Prather left alone for a period of time, Prather returned and called out for "Ray" [Phillips]. Rabon testified Prather and *the victim* then left the residence together.⁷ 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

⁷ 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 20th, the day before the murder. (R. 681, ll. 5-14). However, Rabon testified Prather was at the victim's residence on the 20th, the day before the afternoon and night of the murder. Phillips ["Ray"] was not even there that night. (R. 519-20).

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

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

his fist, hitting the palm of his other hand. Prather then walked off from Sgt. Kleckley *to smoke a cigarette*. (R. 187-189).

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

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

Prather was also impeached regarding his statement to the nurse at the hospital. Again, a completely disinterested witness [this time a nurse] took contemporaneous notes of her conversation with Prather in which he stated that after assaulting the victim, the victim was alive but just barely. Prather denied on the stand he ever made this statement to the nurse. (R. 718, ll.

9-14 & 729, ll. 5-10). Prather also denied he told the nurse that he would probably go to jail for this and other statements testified to by the nurse and police officers. (R. 715, 718-19, 729, ll. 5-10).

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

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

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

Additionally, Prather's trial testimony is inconsistent with *his statement to police* that after the altercation with the victim, he and Phillips immediately left the residence **and Phillips did not re-enter the residence.** (R. 601-06). Prather admitted on cross-examination he never

told police Phillips re-entered the residence. He never told police about Phillips staying in the house 8 to 10 minutes. He admitted this was an important and critical fact he left out of his statement to police. (R. 715-16).

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

Prather was also forced to admit, with some difficulty and reluctance, 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.⁸ 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,

⁸ 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).⁹

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

⁹ 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 reconstruction¹⁰ 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

¹⁰ 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.).¹¹ Prather’s contention LaRosa’s testimony was “unscientific” is completely correct; and it is this point which is fatal for Prather’s argument.¹²

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

¹¹ 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).

¹² 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 (7th Cir. 1989). In light of the grotesqueness of the crime scene, and the condition of the victim's body, Judge Newman did not err in admitting the expert testimony because the jury would be greatly assisted by a professional analysis of the crime scene in comparison to other murder cases in light of Prather's claim at trial. Expert testimony on this subject was reasonably likely to assist the jury in understanding and assessing the evidence, in that the matter at issue was highly material, and beyond the realm of "acquired" knowledge normally possessed by lay jurors. Simmons, 797 So.2d at 1156-57; Meeks, *supra* at 68-69 ("A homicide and its crime scene, after all, are not matters likely to be within the knowledge of an average" juror).

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).¹³ 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 (4th 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

¹³ 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

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Petitioner,

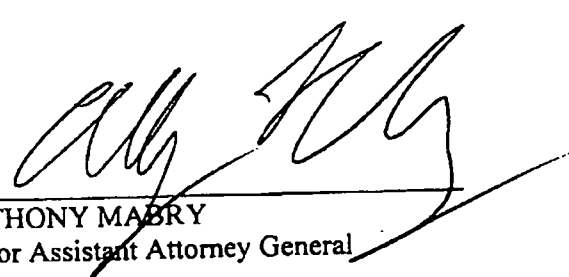
vs.

ROBERT JARED PRATHER,

Respondent.

CERTIFICATE OF SERVICE

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 21st day of December, 2017.



ANTHONY MABRY
Senior Assistant Attorney General

The South Carolina Court of Appeals

The State, Respondent,

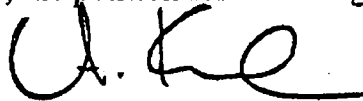
v.

Robert Jared Prather, Appellant.

Appellate Case No. 2014-001500

ORDER

After careful consideration of the petition for rehearing of the substituted opinion issued December 6, 2017, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

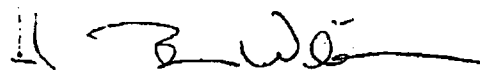


J.



A.J.

I would vote to grant the petition for rehearing in keeping with my dissent.



J.

Columbia, South Carolina

FILED

March 22, 2018