STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Clifton Newman, Circuit Court Judge
On Petition for Writ of Certiorari to the Court of Appeals

Opinion No. 5514 (S.C. Ct. App. filed December 6, 2017)

Appellate Case No. 2018-00753

State of South Carolina,.....Petitioner,

v.

Robert Jared Prather,..... Respondent.

STATE'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner, State of South Carolina, hereby certifies that the petition for rehearing and suggestion for rehearing *en banc* was made, and that the Court of Appeals ruled upon the petition on March 22, 2017. (Appendix p. 228).

QUESTION PRESENTED

Whether the Court of Appeals, over firm dissent, applied an incorrect standard of review, and rejected a concession on appeal, to find an abuse of discretion and reversible error in the admission of the State's reply testimony of a crime scene analyst, when the trial record shows proper reply – the analyst opined on the presence of two perpetrators after the defendant's testimony indicated his co-defendant was alone with the victim during the murder, re-positioning, and disfigurement.

STATEMENT OF THE CASE

On August 22, 2005, after midnight, Gerald Stewart was murdered in his home in Lexington County and several items were stolen. Respondent, Robert Jared Prather, and Joshua Phillips were arrested for the murder later that morning. Prather was subsequently indicted by the Lexington County grand jury for murder and armed robbery. Prather proceeded to a jury trial before the Honorable Clifton Newman from November 26 – 28, 2012.[1] At its conclusion, the jury found Prather guilty of murder and common law robbery. Judge Newman sentenced Prather to thirty years' imprisonment for murder and ten years' imprisonment for robbery. Prather filed a motion for a new trial, which Judge Newman denied by a written order on July 1, 2014.

Prather appealed his convictions and sentences. (Appendix p. 1.) The Court of Appeals, in a two to one published Opinion, reversed, finding the testimony of a State's witness was not

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

proper reply testimony. (Appendix p. 110.) The State filed a Petition for Rehearing. (Appendix p. 130.) The majority granted the Petition without briefing or oral argument and filed a substituted opinion. (Appendix p. 169.) Respondent then filed a second Petition for Rehearing and Suggestion for Rehearing *En Banc*. (Appendix p. 189.) The Court of Appeals denied Respondent's Petition on March 22, 2018. (Appendix p. 228.) Respondent now files its Petition for Writ of Certiorari to review the Court of Appeals published opinion.

SUMMARY OF ARGUMENT WHY CERTIORARI SHOULD BE GRANTED

The South Carolina Court of Appeals departed from established precedent by this Court to place new and unfair restrictions on reply testimony. To reach this result, the Court of Appeals applied an incorrect standard of review and rejected a concession on appeal.

Consistent with established precedent, the trial court allowed crime scene analyst Paul LaRosa to testify about the number of perpetrators involved in the scene after Prather tried to convince the jury that Phillips was the sole perpetrator alone with Stewart in the final moments of Stewart's life. The Court of Appeals did not review the record for abuse of discretion as precedent requires. Rather, the Court of Appeals' majority concluded it was "not convinced" by the dissent's citation to Respondent Prather's testimony that one person committed the crime, "regardless of what the jury may have inferred from it." (Appendix, p. 176, n. 4.) Respectfully, it is immaterial whether the Court of Appeals was "convinced" by the state court record. That is not the appropriate standard of review. As long as the trial court was convinced, and that decision was supported by the record, the Court of Appeals was not permitted to reverse the trial court's ruling. In his dissent, Judge Williams cited to appropriate supporting evidence in the record,[2] which is sufficient to show the trial court did not abuse its discretion. Judge Williams

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[2] (Appendix, p. 180, n. 6.)

correctly reasoned the trial court did not abuse its discretion in admitting the testimony of crime scene analyst in reply because the testimony was contradictory to Prather's claim he left Phillips in the house alone with Stewart, suggesting only Phillips participated in the staging of the scene. (Appendix p. 180-181.) The Court of Appeals, in reversing the trial court despite ample support in the record for its findings, overstepped its bounds and restricted the State's use of reply testimony beyond that of current state law. Further, the Court of Appeals' determination of reversible error is confused and contradictory – if the reply testimony did not contradict Respondent Prather's testimony (as the majority found), then it could only be harmless as it did not go to guilt or innocence, but then again, if it did contradict and undermine Respondent Prather's testimony causing prejudice, then it was proper reply (it is prejudicial but not unfairly prejudicial – a key point).

In contrast, Judge Williams rejected a finding the testimony was prejudicial to Respondent Prather, when LaRosa did not identify who was involved in arranging the scene, only opining generally about the conflicting personalities reflected in the "staging" and "undoing" of the crime scene. (Appendix p. 183.) Judge Williams also found any admission of testimony harmless error, responding "particularly to [the majority's] point that LaRosa's testimony left the jury with only the conclusion that Prather was the second offender," given Prather's admission of severely beating Stewart to the point he was barely alive, in conjunction with the pathologist's testimony on the cause of death, and the stolen items and knife found in Prather's car, along with blood on Prather's sock and shirt. (Appendix pp. 183-184).

Because the Court of Appeals applied an incorrect standard of review and rejected a critical concession, which resulted in creating new restrictions on reply testimony, and also because there is strong disagreement in the Court of Appeals concerning the trial court's

discretion to admit the testimony in reply, and the admission of testimony in this case, the State respectfully asks certiorari be granted.

STATEMENT OF FACTS

Gerald Stewart was described as a large, big hearted man, but he was also a chronic drinker, an alcoholic and had sought treatment for years. He could drink large amounts of alcohol and never pass out. Stewart had a tendency to brag and spend whatever money he had on him on others. (R. pp. 184-185, 370-380, 503-511, 550.) Unfortunately, these last tendencies came back to haunt him.

On April 22, 2005, Stewart was murdered in his own home in West Columbia. When police responded to the home at 5:30 a.m., the doors were locked, and police gained entry by crawling through an unlocked window. Once inside, police found Stewart covered with a blanket and a pillow over his head. The blanket and pillow were removed. Stewart 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 Stewart's shoulder. (R. pp. 268-283, 283-291, 317-319, 831-832.)

An E.M.T. determined Stewart was deceased and noticed someone had carved a word in Stewart's lower back and down his buttocks with a sharp instrument. The word was "rapist." A sex toy (a dildo) was also placed under Stewart's shoulder on the couch. (R. pp. 283-291, 322-323, 345.)

The autopsy determined Stewart died as a proximate result of a beating: blunt force trauma causing a cardiac arrhythmia, causing Stewart's heart to stop beating. Suffocation could not be ruled out as a contributing factor because of the position of Stewart when he died. (R. pp.

339-352.)[3] Stewart 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 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 middle finger on his right hand – all in addition to the word carved into his buttocks and lower back. All of the injuries occurred before death. The manner of death was homicide, *i.e.,* caused by the act of another or others. (R. pp. 339-352.)

Inside the home, police found the Stewart's new housemate, Rob 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 22, and did not hear Stewart's murder. Rabon testified that earlier the previous day, April 21, 2005, Prather and his co-defendant, Phillips, had come to the home and were drinking with Stewart and playing cards. Rabon testified when he met Prather and Phillips they represented themselves to be "Jerry" and "Ray," not Jared and Joshua. Rabon was suspicious of the men and thought they were up to something. Rabon witnessed an altercation in which Phillips punched Stewart in the lips twice, busting his lip. Rabon stopped Phillips from punching Stewart anymore by yelling at him. Prather also yelled at Phillips and told him to stop and to get something to clean Stewart up, or Prather was going to jump on Phillips. Rabon said, based on his observations of the men, Prather was the leader and Phillips was the follower.

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[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. pp. 339-352, 417, 506-507.)

[4] Rabon is partially deaf in one 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. pp. 512-547.) Prather testified at trial Rabon had nothing to do with the victim's death. (R. pp. 656-731.)

Rabon then talked with Stewart privately and told him he needed to "remove these people" from his home. Stewart said everything was alright and allowed the men to stay. (R. pp. 512-547.)

At some point in the evening, Prather left the house and Rabon retreated to his bedroom. Later during the night, Rabon got back up to go to the bathroom or kitchen and saw Stewart and Phillips engaged in some kind of consensual sexual act in the living room and then in Stewart'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. (R. pp. 512-547.)

When Prather returned to Stewart's home, he 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 Stewart and Prather left the residence together. Rabon left his room and saw Phillips still lying in the victim's bed. Rabon testified there was no argument when Stewart and Prather left together. Because things seemed to have calmed down, Rabon then went to 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. pp. 533-536.)

Police discovered Stewart's body after receiving a call from the Lexington Medical Center Emergency Room. Two men had appeared at the ER at 4:28 a.m. Prather claimed Phillips had been sexually assaulted. Prather was doing almost all of the talking. (R. pp. 181-196, 206, 562-564.) Prather told the ER 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. Prather found Phillips in the victim's bedroom wearing nothing but his boxers. 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 that he severely beat the old man. (R. pp. 562-564.) Phillips also stated he had beaten the man. Prather said Stewart was alive, but barely, and was probably still laying there. Prather also said 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. pp. 562-580.)

The nurse then obtained the victim's wallet from Phillips, who had it on his person. Prather said the nurse could keep the wallet because, "it's not like it was a robbery or anything." From the wallet, the 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, called the police. (R. pp. 562, 574-575.)

The ER 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 Gerald Stewart. There was no trauma to Phillips' rectum, and Phillips did not complain of a sexual assault. However, there were superficial marks and scratches on Phillips' arms and back indicating he had been in some type of struggle before arriving at the ER. Phillips' toxicology screen was completely negative for alcohol or drugs. (R. pp. 212-249, 250-258, 259-267, 425-426.)

When police arrived at the ER, Prather told them his friend was sexually assaulted, and as a result he, Prather, had severely beaten the victim: "I beat the shit out of him." Prather stated he hit the victim with "devastating blows." Prather described striking the victim by striking his fist in the palm of his other hand. Prather said 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. pp. 181-196, 196-206.)

Prather was interviewed at the police department and gave a statement regarding his alleged version of events. Prather claimed when he returned to Stewart's home that night, he entered the home without knocking. Stewart came out of his bedroom completely naked.[5] 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 Stewart grabbed him by the arm. Prather 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 immediately drove away. (R. pp. 585-611.) Prather at first stated they drove directly to the hospital. He then changed his statement and said he and Phillips went to Calloway's bar and shot pool. They then decided to go to the hospital. (R. pp. 585-611).

At trial, Prather testified in his own defense and described a different version of events than what he told police or hospital personnel. Prather claimed after he returned to the victim's residence and was confronted by the nude Stewart, who he believed had just sexually assaulted his friend, Prather punched Stewart several times. He located Phillips, woke him from a deep sleep, and they attempted to leave the residence. Phillips then attacked the victim near the couch, but the victim was alive. Both Prather and Phillips then left the residence together. However,

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[5] This contradicted Prather's statement to two different police officers and the nurse at the ER 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. pp. 188, 201.)

according to Prather, Phillips then went back into the residence where he remained for eight to ten minutes. Phillips then came out of the residence with something in his hands, and the men then left in Prather's car. (R. pp. 651- 671.) At the prompting of defense counsel, Prather looked at the jury, and then specifically denied causing the victim's death, staging the crime scene, or undoing the crime scene. (R. pp. 676-677.) On cross-examination, when asked about the carving of the word "rapist" on Stewart's body, Prather denied any involvement, saying, "No, I think it's really fucking disgusting whoever did it." (R. p. 723.)

The State argued the reply testimony became relevant when Prather testified he walked in on a rape, retrieved his friend, and then remained outside the house when Phillips returned inside for several minutes. (R. p. 733.) The crime scene analyst would opine the crime scene was staged to look like a rape-revenge, but was actually inconsistent with Prather's version of events. (R. p. 733.)

The State called crime scene analyst Paul LaRosa, who testified an experienced crime scene analyst would know when a crime scene is staged because the scene "doesn't flow correctly." (R. p. 742.) LaRosa opined the carving of the word "rapist" appeared to be an act of anger by someone disgusted with the victim for his actions, but in actuality the wounds were only "superficial." (R. pp. 742-743.) LaRosa also testified there were signs of "undoing" the crime scene, indicating another actor wanted to erase, or cover up, what happened to the victim. (R. p. 744.) LaRosa said he saw two distinct personalities involved in the crime scene, but did not attempt to identify which two individuals were involved. LaRosa acknowledged he had done no profile on Stewart, Prather, or Phillips, and could only opine on the number of people involved. (R. p. 745-746.)

After citing the correct standard of review, the trial court found LaRosa's testimony to be proper reply because it was raised in response to Prather's testimony: 1) he was not involved in staging the scene, and 2) Philips was alone in the house when the staging occurred. (R. p. 752.) It was this ruling the Court of Appeals reversed, despite the trial court's stated reasons supporting its decision to admit the testimony.

ARGUMENT

The Court of Appeals erroneously found reversible error in admission of reply testimony even though the trial court acted within its discretion, and the defendant conceded the reply testimony contradicted his own testimony – the very basis for properly admitted reply.

The Historically Broad Discretion of the Trial Court to Admit Reply Testimony

This Court has long held the admission of reply testimony is within the discretion of the trial judge. *See, e.g., Goethe v. Browning,* 146 S.C. 7, 143 S.E. 362 (1928) ("The admission of evidence in reply rests largely in the discretion of the trial judge...."). 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). 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).[6] There are some limitations on reply testimony. "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

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[6] *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).

used to complete the prosecution's case. *Id.; State v. Robinson*, 223 S.C. 314, 75 S.E.2d 465 (1953). Reply testimony must relate to a material issue of guilt or innocence at trial, not a collateral matter. *See State v. Bailey*, 279 S.C. 437, 440, 308 S.E.2d 795, 797 (1983).

Further, our courts have recognized the possibility that new evidence, though contradictory, could be raised in reply, and have authorized a remedy. This Court has approved the use of surrebuttal testimony in such instances. *Goethe v. Browning,* 146 S.C. 7 at 18, 143 S.E. at 366. "[I]f the plaintiff in reply puts new matter in evidence, or makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal." 55 S.C. 32, 40, 32 S.E. 771, 774 (1899) (citation omitted); *see also Camlin v. Bi-Lo, Inc.*, 311 S.C. 197, 200, 428 S.E.2d 6, 8 (1993); *State v. Watson*, 353 S.C. 620, 624, 579 S.E.2d 148, 150 (Ct. App. 2003).

Proper Standard of Review: Whether the Ruling was an Abuse of Discretion

Because admission of reply testimony rests in the discretion of the trial court, appellate courts will not disturb the ruling unless they find an abuse of discretion. *Goethe v. Browning, supra.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jones,* 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (citing *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007)). A reviewing court does not substitute its view of the facts, rather, considers whether there is factual support for the discretionary ruling. *See State v. Wilson,* 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

Appellant Conceded LaRosa's Testimony Contradicted Prather's Testimony

Prather conceded in his brief before the Court of Appeals that LaRosa's reply testimony contradicted Prather's trial testimony. (Appendix, p. 17.) The Court of Appeals' majority ignored

this concession and its impact in its Opinion. This concession, that LaRosa's testimony contradicted Prather's trial testimony, was argued to the Court of Appeals in Respondent's brief (Appendix, p. 72, footnote 12), at oral argument, and in the petition for rehearing and suggested rehearing *en banc* (Appendix, p. 191). This concession should have ended the inquiry whether the testimony was proper reply. However, the Court of Appeals completely overlooked this concession in its Opinion.

As pointed out by Judge Williams in his 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."

(Appendix p. 180-181.) Even Prather acknowledged this to be a fair reading of the record, when he argued in his brief the testimony of LaRosa directly "...contradicted Prather's testimony that he was not involved in, nor did he witness, any carving of the word 'rapist' on Stewart and had no knowledge as to Stewart's being covered in a blanket. It also contradicted Prather's testimony that he left Phillips in the house alone with the decedent. In short, it was offered to impeach Prather's version of events regarding Stewarts' death... ." (Appendix, p. 17.) The Court of Appeals erred in finding the trial court abused his discretion when even Prather, on appeal, considered the testimony contradictory impeachment material. *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.") The evidence was proper reply.

Admissibility in the Case in Chief Does Not Preclude Its Offer In Reply

The Court of Appeals 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 in 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).[7]

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

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[7] *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).

at the time it was fired. *See State v. 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.* Just because the probative value became enhanced on reply, it did not preclude its admission on reply.

Similarly, in a murder prosecution where the defendant testified he shot his son three 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. *See State v. McDowell*, 272 S.C. 203, 205, 249 S.E.2d 916, 917 (1978) (per curiam). 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 shots while the victim was standing, the probative value increased to rebut and contradict the defendant's claims. *Id.*

The same is true in the present case. The testimony of LaRosa could have been offered in the State's case in chief, but it was not *necessary* to complete the State's case. Prather testified that Phillips was alone in the house without Prather for eight to ten minutes, and that he, Prather, did not commit the crime. Once Prather testified and pointed the finger at Phillips as the sole perpetrator, the testimony became admissible as proper reply or rebuttal testimony. 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.

Appellant Is Not Entitled To Anticipation of Reply Testimony

The Court of Appeals wrongly reversed Prather's conviction and sentence based on a finding that Prather could not have anticipated LaRosa's testimony. (Appendix p. 177.) 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); s*ee 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. The Court of Appeals erred by imposing this requirement on the State in contravention of prevailing state law.

Respondent Prather Never Asserted Rabon Participated in the Murder or Repositioning

The Court of Appeals also wrongly construed the record and Respondent Prather's arguments in its erroneous finding of what Prather claimed in his testimony at trial. In reading Prather's trial testimony as a whole, it is clear Prather was not asserting Ron Rabon had anything to do with the victim's murder. (R. pp. 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 Rabon would have had nothing to do with it. (R. pp. 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.) Later, the solicitor asked about the moments immediately after the beating, and the following exchange occurred:

> 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. p. 714, ll. 19 – 715, ln. 5.) (See also R. 723, ln. 1 – 728, ln. 15, emphasis on "Josh" coming outside to join Prather and "Josh" having items belonging to victim; and "Josh" could have put a knife in the passenger side floorboard of Prather's car.)

There is no question from this testimony Prather was directly or implicitly 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 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. 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. Further, Ron Rabon had no motive to carve "rapist" in the victim's buttocks or cover Stewart's body with a blanket or his head with a pillow. Prather asserted Phillips was sexually assaulted by Stewart. Prather asserted Phillips kicked the victim as the two of them left the house for the first time. Finally, the jury would have to completely disbelieve both Rabon's 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, the Court of Appeals wrongly ignored the record before it in concluding Prather did not testify to the number of perpetrators involved or a motive for carving "rapist" into Stewart's back.

The Court of Appeals also erroneously found 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. 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.

The Admission of the Testimony, if Error, Was Harmless Beyond a Reasonable Doubt

The Court of Appeals made inconsistent findings in its Opinion on the impact of LaRosa's testimony. First, the Court held LaRosa's testimony was not proper reply because LaRosa's testimony did not refute or contradict Prather's testimony. The majority noted LaRosa testified at least two individuals were involved in the crime scene. The majority also pointed out in a footnote that Phillips and Rabon were still inside the home when Prather was outside in the car. (Appendix p. 177.) The majority asserted this shows the testimony was not proper reply because it did not directly contradict Prather's testimony.

Later, 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 people were active in the crime scene. (Appendix p. 178.) 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. It is one or the other; it cannot be both. It is either proper reply in that it contradicted Prather's testimony, or, if it did not contradict Prather's testimony, then it was harmless beyond a reasonable doubt.

Moreover, the evidence of Prather's guilt was overwhelming. Ron Rabon, an independent witness to the events that night, testified Prather and Phillips used false names at the victim's residence. This indicates a nefarious intent of both Prather and Phillips at the time they met Stewart. Rabon also testified he was suspicious of the men from the beginning and told the

victim he needed to get the men out of the house. (R. pp. 520-528.) Rabon saw a consensual sexual encounter between Phillips and Stewart on the living room couch and in the victim's bed. As a result, there was no rape or sexual assault of Phillips, which was confirmed by the hospital exam. (R. pp. 531-535, 543.) A bartender saw Prather and Stewart together some time after the alleged beating of Stewart by Prather, proving the murderous assault and staging and undoing occurred after the victim and Prather returned to the victim's residence together. (R. p. 554.)

Prather gave numerous inconsistent statements to police concerning his whereabouts the night of the murder. (R. pp. 699-700, 599-601.) Prather testified at trial he barely knew Phillips, testifying Phillips was an acquaintance of an acquaintance. (R. pp. 678-680, 682, ll. 2-25, 683, ll. 11-16, 685, ll. 17-23, 688, ll. 9-13.) However, an emergency room nurse testified Prather informed her that he and Phillips had been friends for years. Prather was also impeached regarding his statement to the nurse at the hospital. Again, the nurse, a completely disinterested witness, 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. pp. 718, ll. 9-14, 729, ll. 5-10.) Prather also denied he told the nurse that he would probably go to jail for the beating. (R. pp. 715, 718-719, 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 a trip to the pool hall. (R. pp. 718-19.)

Additionally, Prather's statement to medical personnel and to police he hit the victim with devastating blows and the victim was alive, but just barely directly contradicts Prather's trial testimony in which he asserted he hit the victim two or three times. (R. pp. 704-705, 718.) Prather testified two of the blows were struck as he was on his tip toes. (R. p. 705.) The last or third blow was as the victim was falling to the floor. Prather testified at trial that when he left the

home the victim was fine, not barely alive. (R. p. 718.) Further, at the hospital Prather stated he needed to wash the blood off of his hands. (R. pp. 570, 908.) And, Prather acknowledged he had blood on the back of his shirt and on his socks. (R. pp. 716, 799.) This is inconsistent with his trial testimony regarding the number of times he hit the victim and the severity of those blows.

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. pp. 723-24.) The State introduced the fact that Prather's co-defendant misspelled the word "rapist" two times in talking to police. A knife was found in Prather's car after the murder, despite Prather's claims he did not know it was there. (R. p. 730.) 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. p. 722.) They did not call 911 from Phillips' brother's residence when they stopped there after the incident. (R. p. 722.) They did not call 911 from the pool hall, either. (R. p. 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. pp. 721, 652.)

Prather was found in possession of a pack of cigarettes and a cigarette lighter. (R. p. 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 Court of Appeals' recitation of the facts or its Opinion, including the harmless error analysis, yet Prather admitted during cross-examination he had given someone a cigarette that night. (R. p. 693, ll. 1-7.)

In summary, Judge Williams' dissent in the Court of Appeals' Opinion is correct. Prather was impeached the proverbial five 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 eight to ten 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.*

The Court of Appeals also erred in 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 the Court, only a portion of Respondent Prather'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. The Opinion accepted appellate counsel's assertion in the brief that only two new pieces of evidence were introduced in this trial. (Appendix, p. 179.) 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). Any reliance on this information was improper by the Court of Appeals.

CONCLUSION

The Court of Appeals placed applied incorrect standard of review and placed new limitations on the admissibility of reply testimony, in contravention of prevailing state law. Further, the majority incorrect omitted the critical concession on appeal that undermines the findings supporting relief. Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully submitted,

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April 30, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2018-00753

State of South Carolina,.....Petitioner,

v.

Robert Jared Prather,..... Respondent.

CERTIFICATE OF SERVICE

I, Susannah R. Cole, hereby certify that I have serve the Petition for Writ of Certiorari by State of South Carolina and the Appendix in the foregoing action by depositing copies 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 30th day of April, 2018.

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