STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2018-00753

THE STATE OF SOUTH CAROLINA.....Petitioner,

vs.

ROBERT JARED PRATHER.....Respondent.

BRIEF OF RESPONDENT

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Statement of the Case

Robert Jarad Prather was indicted by the Lexington County Grand Jury of murder, armed robbery, and burglary in the first degree. 2008-GS-20-2929). He was initially tried on October 26-28, 2009, but the jury did not convict. Three years later, the State tried him again. He was tried before the Honorable Clifton Newman and a jury between November 26-28, 2012. He was convicted and sentenced to 30 years in prison.

Prather then timely filed his conviction and sentence and the South Carolina Court of Appeals reversed. After the State filed a petition for rehearing, the Court granted the motion, and then filed a substituted opinion. *State v. Robert Jarad Prather*, 422 S.C. 96, 810 S.E.2d 419 (Ct. App. 2017). The State filed a second petition for rehearing which was denied on March 22, 2018.

The State filed a petition for writ of certiorari which this Court granted on August 3, 2018.

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, ll. 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" 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] 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 carved, was also covered with a blanket. 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 the 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

[1] "Rapist" was carved into the decedent. "Rapeist" was contained twice in Phillips' statement. From that, the jury was asked to infer that Prather was the "carver."

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. 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, the decedent, 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]

In the early morning hours of the decedent'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 discovered Stewart was a homosexual when he walked in on him and another gentleman watching a pornographic movie together. Despite his presence at the house when Stewart died, law enforcement never investigated him as a suspect.

Relevant Events of April 21-22, 2005

Prather testified on his own behalf at both 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. The night he met him,

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[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).

Prather told Stewart that he had received a fine in Richland County. Stewart said that he knew a judge who could reduce that fine. 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. Prather said he called Stewart a couple of weeks later, and they agreed to go meet the judge one Saturday morning. Prather picked him up at his house, and they met with the judge. R.pp. 652-53.

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. . 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.pp. 653-64.

The next morning, the young men did not have anything to do. Joshua suggested that they go to Gerald Stewart's house. R.p. 654, ll. 16-25. Prather drove. R.p. 655, l. 20. They arrived around 1:00 pm. R.p. 655, l. 6. The three of them hung out and drank. Phillips and Stewart were drinking whiskey. R.p. 655, ll. 10-12. When they ran out of booze, Prather drove all of them to the store to get more. R.p. 655, ll. 17-20. Around 5:00- 6:00 pm, Ron Rabon, Stewart's roommate, arrived. R.p.656, ll. 1-15. He changed out of his work clothes and then joined them. Around 8:00 pm, they left to buy more whiskey. They ended up buying beer instead. R.p.657, ll. 4-5. They returned to the house and went back to playing cards. 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, ll. 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. 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.

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, ll. 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, ll. 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, l. 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, ll. 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, l. 25. Stewart eventually came out, and they drove off. R.p.662, ll. 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, ll. 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, ll. 23-24. Prather said the bartender told him not worry about it; that he does it all the time. R.p.664, ll. 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, l. 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, ll. 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, ll. 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, ll. 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, l. 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, l. 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, ll. 19-20. Joshua was screaming and upset and kicked Stewart. R.p.66, l. 23- p. 669, l. 4.

At the time of this incident, Prather weighed 135 pounds. R.p.669, l. 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, ll. 6-8. When he left the house, Stewart was still alive. Prather denied that he carved anything into Stewart's back. R.p.670, ll. 23-25.[3]

[3] Petitioner's brief states that Petitioner "specifically denied causing the victim's death, staging the scene, or undoing the crime scene." Pet's Br. p. 10. This is misleading. Petitioner did not use any of the forensic behavioral science language later used by LaRosa, so LaRosa's testimony cannot be understood as a "rebuttal" to that specific language or those concepts. Petitioner merely asserted his innocence by denying that he killed the victim or carved "rapist" into his body.

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, ll. 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, ll. 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, ll. 23-25.

At the hospital, Prather told a nurse, Donna Sharpe, what happened. R.p.673, ll. 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.[4]

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[4] Petitioner's brief provides a citation to 75 pages of trial testimony that it asserts stands for the proposition that "Prather testified at trial Rabon had nothing to do with the victim's death." Pet's Brief, p. 7, n.3. It then claims the Court of Appeals "wrongly construed" the record and that "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." Pet's Br. p. 17. From this, it argues that Prather was "directly or implicitly pointing the finger at Phillips as the perpetrator alone." Pet's Br. p. 18. The pages cited by Petitioner are to Prather's trial testimony and merely recounts what happened on that date. It is misleading to read this testimony as Prather's either inculpating or exculpating Rabon from the events of that night. This is important to the Petitioner's claim that LaRosa's testimony merely "rebutted" Prather's claim that only one person was responsible for the decedent's death, but it is not an accurate reading of Prather's testimony.

ARGUMENTS

I. **The Court of Appeals' decision in *State v. Prather*, 422 S.C. 96, 810 S.E.2d 419 (2017) should not be disturbed because it is an accurate statement of the law and its application to the facts of this case compelled by due process. 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" in rebuttal when it was not proper rebuttal. As additional sustaining grounds on this issue, Prather also submits the evidence was scientifically unreliable and improperly invaded the province of the jury.**

In rebuttal, and without any notice to the defense, 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, ll. 16-17.[5] *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

[5] 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, ll. 11-25.

photos and 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, 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. R.pp. 995-1003. Additionally, his testimony did not establish any sufficient training in the area of psychology, which is especially noteworthy given his offered expertise was his ability to put himself into the minds of the assailant(s). Had LaRosa reviewed additional records that were readily available, 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 (as he admitted to during his guilty plea)—all without Prather's participation.

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 before been accepted as an expert witness in crime scene analysis. R.p.747, ll. 17-19. He had not been given any information relating to Joshua Phillips mental health history. R.p.748, ll. 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, l. 23- p. 748, l. 6[6]. 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, l. 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, ll. 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 SLED letterhead with the FBI seal right next to it, and

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[6] 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.

> 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 been 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, and as the South Carolina Court of Appeals found, it was not appropriate rebuttal testimony. The State did not show any reason why LaRosa was 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). *See also* Laurence Alison, Craig Bennell, *et al. The Personality Paradox in Offender Profiling*, 8 Psychol. Pub. Pol'y & L. 115 (March

2002) (finding that much of what is considered standard practice in offender profiling falls short of current understanding in psychology about various psychological processes and principles, and therefore profiling practices do not meet basic expert witness standards under Federal Rule of Evidence 702).[7] Trial counsel was simply incapable of responding to the State's surprise 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, as another sustaining ground to uphold the Court of Appeal's decision, this Court should consider that 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"). Had defense counsel been given any previous warning this testimony was going to be introduced, and properly challenged this suspect evidence, it is likely the judge would have excluded it pursuant to *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009).

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[7] The authors additionally argue that profiling should be used with extreme caution in criminal investigations and not at all as evidence in court until research demonstrates its predictive validity. *Id.* at 116.

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 judge also 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. The South Carolina Court of Appeals' decision correctly found the judge abused his discretion.

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 Solicitor's 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 decedent's body which LaRosa testified indicated the presence of "two personalities.")

The trial court judge also committed a significant factual error 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 the South Carolina Court of Appeals' decision is a correct application of the law to the unique facts of this case.

The South Carolina Court of Appeals' Opinion

In its opinion, the South Carolina Court of Appeals correctly, and reasonably, held that LaRosa's testimony was not limited to refuting Prather's testimony. As the Court notes, Prather did not testify to the number of perpetrators or to anyone's motives carving rapist, for the placement of the dildo, or for covering the victim with a blanket at the scene. Prather did not testify to the killing happening in a particular manner or for a specific reason. *Prather*, 422 S.C. at 424; 810 S.E.2d at 106. He merely asserted, by way of testifying on his own behalf, his innocence of the crime, as he had the constitutional right to do.

The dissent commits the same legal error as the trial court, by failing to consider a number of factors that should have guided the trial court's discretion in deciding whether to admit this testimony or not. The dissent does not consider why the State waited until after Prather testified to reveal this witness, or why the State purposely omitted this witness from an otherwise complete witness list at the beginning of trial. The dissent does not consider that forensic behavioral science is a

complicated and controversial area of expertise and that trial counsel, without any warning at all, would not have been able to mount a meaningful challenge to it on the fly. More than simply challenging Prather's testimony, LaRosa's testimony introduced an entirely new and unexpected field of forensic science. Under the unique facts of this case, it was error, and Prather's substantial rights were violated.

The State's introduction of this testimony was highly prejudicial given the timing of this testimony, which occurred after Prather's testimony and without any warning. It was also unduly prejudicial because this was not a case of overwhelming guilt. As noted, initially this case resulted in a hung jury and the State waited three years to retry Prather. Also, this Court should consider LaRosa's improper bolstering of his own testimony by referring to the SLED and FBI agents who have approved of his work, and the high degree of deference generally afforded to scientific experts by juries. This Court should also consider the use the State put this testimony in arguing for Prather's guilt in its closing argument. Again, under the unique facts of this case, the Court of Appeals was correct to find the error was not harmless.

This Court should affirm the Court of Appeals' opinion because it is a correct articulation of well-established South Carolina law, applied correctly to the unique facts of this case.

OTHER SUSTAINING GROUNDS

In addition to the argument presented above, respectfully Prather asks this Court, pursuant to Rule 220(c), SCACR to affirm on these additional grounds:

I. **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,[8] the degree to which the

[8] *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).

prosecutor's conduct may have prejudiced the defendant,[9] and whether the weight of the evidence made conviction certain absent the improper conduct.[10]

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 the evidence against Prather was circumstantial and did not conclusively point to his guilt.

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

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[9] *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).

[10] *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 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). *See also 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.

II. The trial court abused its discretion by allowing the State to introduce into evidence portions of his co-defendant's statements to law enforcement because (1) it was inadmissible hearsay, (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 statements made by an out-of-court declarant, offered to prove the truth of the matter asserted. 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. Rule 801(c), SCRE. 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 Irrelevant[11]

Phillips' purported misspelling of "rapist" was additionally irrelevant to show that Prather carved "rapist" into the back of the decedent. Under Rule 401, SCRE 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

[11] 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 has being involved in the carving of the word on the Victim's back." R.p. 981.

Stewart died, carved the word into the decedent's buttocks. This evidence was exceedingly speculative and based on the principle of false alternatives that either Phillips knew how to spell "rapist" and therefore either he or Prather must have carved "rapist" into the decedent's buttocks, or Phillips did 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*, 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. *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."

III. The trial court 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 heart[12], sclerosis of the liver, enlarged spleen, evidence of diazepam[13] 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, ll. 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, ll. 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, ll. 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, ll. 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, ll. 4-11. She stated she could not answer that because she is not a "clinician." R.p.363, ll. 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

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

13 Also known as "Valium."

combination of the two."[14] R.p.427, ll. 15-25. 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

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[14] 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, ll. 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, ll. 2-6.

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.

IV. The State's actions in pursuing factually inconsistent theories in Prather and Phillips' case 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 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 the Solicitor 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 claimed, 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, ll. 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, ll. 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, ll. 23-24. Rabon and the decedent had met in treatment where they were both being treated for alcohol and drug abuse. R.p.513, ll. 9-22. The decedent invited Rabon to stay at his home for $100 a week because he needed someplace to stay. R.p.514, ll. 11-22. At the decedent's house, Rabon found a male sex tape, and asked the decedent about it. R.p.516, ll. 19-20. The next night, Rabon encountered the decedent and another man watching the tape together. R.p.517, ll. 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, ll. 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, ll. 16-19. This happened earlier in the day the night he died.

Rabon testified that Joshua Phillips passed out, R.p.531, ll. 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, ll. 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, ll. 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, ll. 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.

V. **The trial court abused its discretion, and Prather was denied due process of law, when it did not allow Prather to introduce a statement made by Ralph Joy 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 the decedent'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 have revealed 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, ll. 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.

CONCLUSION

Respectfully, this Court should affirm the opinion of the South Carolina Court of Appeals because it is a correct statement of the law, and is correctly applied to the facts of this highly unusual case.

Respectfully submitted,

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October 4, 2018.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2018-00753

THE STATE OF SOUTH CAROLINA.....Petitioner,

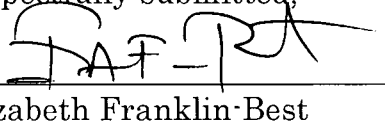
vs.

ROBERT JARED PRATHER.....Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served this Respondent's brief on Petitioner by depositing them via US Mail, first class, postage pre-paid, this 4th day of October to Susannah R. Cole, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

Respectfully submitted,



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