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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-002531

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SC Court of Appeals

State of South Carolina, ... Respondent

v.

ANGELITA WRIGHT ... Appellant.

APPELLANT'S FINAL REPLY BRIEF

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REPLY ARGUMENT

In a misguided attempt to support an unqualified expert, Respondent seeks to chip away at Rule 702, SCRE piece by piece. First, Respondent asks the Court to hold a police officer (Brandon Letterman) who attended a one-day training class could be labeled a cell phone mapping "expert" and effectively tell jurors technology contradicted Ms. Wright's alibi and put her at the murder scene at the time of Brent Tessnear's ("Decedent") death. Resp't Br. at 30-32. Then, Respondent goes a step further, arguing for the first time on appeal Letterman did not need qualifications because his opinion testimony on the results of cell phone mapping and the carrier-specific quirks of cell phone records are all common knowledge anyway. Resp't Br. at 28-29, 35. Finally, Respondent makes a sweeping argument against the Court's well-established expert gatekeeping duties, criticizing Ms. Wright for questioning the amount of Letterman's qualifications and suggesting disputes over qualifications do not affect admissibility. Resp't Br. at 31.

South Carolina law does not support any of these arguments. In fact, the expert qualification standard Respondent's brief suggests would do little to distinguish proposed experts from lay witnesses and almost nothing to ensure conclusions presented to jurors as expert testimony are offered by a knowledgeable person. Pursuant to South Carolina's recently reaffirmed expert qualification standard, Letterman's testimony should have been excluded. Moreover, Letterman's testimony was not proper rebuttal evidence since he did not respond to specific evidence Ms. Wright presented. Since Letterman's testimony was an important part of Respondent's case, these errors cannot be corrected without granting Ms. Wright a new trial.

1. Letterman Stated Conclusions and Opinions Requiring Expert Qualifications.

Respondent's argument that "it was not necessary" for Letterman to be qualified as an expert (Resp't Br. at 35) fails to acknowledge the substance of Letterman's testimony,

misconstrues the nature of lay v. expert opinion evidence under South Carolina law, and ignores substantial persuasive authority rejecting the notion that cell phone forensic/mapping testimony is a matter of common knowledge.

As an initial matter, the Court should not consider Respondent's argument on this point because it was not presented to the circuit court. When Ms. Wright objected to Letterman's qualifications, Respondent's sole argument was Letterman in fact met the threshold qualification standard. (R. p. 487, line 24 – 488, line. 4). There was no suggestion expert qualifications were unnecessary or that Respondent's attempt the qualify Letterman was merely precautionary. Respondents could argue it has raised this issue at this late stage as an additional sustaining ground. But, while Respondent is not barred from raising as proposed additional sustaining grounds arguments omitted below, this tactic is disfavored and the Court has discretion to ignore such arguments. I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it").

The argument also fails on the merits. Respondent contends Letterman "merely describes the information in a cell phone record" and that his testimony did not cover either complex topics or information beyond a lay juror's common knowledge. Resp't Br. at 28 and n. 17. However, Letterman did far more than just read cell phone records. He offered his definition of terms used in the cell phone industry presumably because Respondent did not believe lay jurors would understand the terms otherwise. For example, Letterman was questioned extensively about calls to and from Ms. Wright's phone on the day Decedent was killed. In those instances where calls were listed as going to "call forwarding," Letterman was asked to provide a technical definition of the term. (R. p. 489, line 20 – 490, line 7). Letterman then examined Ms. Wright's cell phone

records further and told jurors that, based on the phone number listed, several of the calls were transferred to T-Mobile's default voicemail inbox. (R. p. 490, lines 8-17). A lay juror would have no idea this apparently random 11-digit number corresponded to that inbox without a proposed expert explaining the number's designated purpose. Moreover, Letterman's entire testimony built toward a conclusion that in no sense constituted a description of the cell phone records. Letterman was asked to interpret the records and draw conclusions regarding Ms. Wright's whereabouts around the time of Decedent's death. (R. p. 495, line 24 – 496, line 7). This was a paradigmatic question-and-answer exchange between counsel and its *expert* witness and it is no wonder that, throughout the trial, Respondent treated Letterman as if expert qualifications were required.

Both in these examples and overall, Letterman's testimony could only be admitted if he was first qualified as an expert. Generally, witnesses are limited to testimony regarding matters within their personal knowledge. Rule 602, SCRE. Opinion testimony may be admitted in some instances but is limited to the matters outlined in Rules 701-02, SCRE. A non-expert witness may offer his/her opinion only on matters they perceived and for which no "specialized knowledge, skill, experience, or training" is required. Rule 701, SCRE. For all other opinion evidence, the witness and testimony must meet the qualification, reliability, and helpfulness requirements of Rule 702, SCRE. Applying these rules, South Carolina courts have held that experts are different than lay witnesses in that only an expert may state an opinion based on facts not within his firsthand knowledge. Watson v. Ford Motor Co., 389 S.C. 434, 445-46, 699 S.E.2d 169, 175 (2010); see also In re Care & Treatment of Thomas S., 402 S.C. 373, 379, 741 S.E.2d 27, 30 (2013) ("a lay witness may only testify as to matters within his personal knowledge").

Lay witnesses may not offer opinions on anything that "requires specialized knowledge, skill, experience, or training." Watson, 389 S.C. at 446, 699 S.E.2d at 175. A witness crosses over

from lay to expert testimony anytime the witness go beyond personal knowledge to base opinions or conclusions on "information made available" to him before trial. Id. at 445-46, 699 S.E.2d at 175; see also Rule 703, SCRE. The South Carolina Supreme Court recently held that to distinguish lay testimony from expert opinion, a court must make a determination of what knowledge is commonly held by the average juror. State v. Jones, 423 S.C. 631, 638, 817 S.E.2d 268, 271 (2018). Thus, to credit Respondent's new argument that Letterman did not need expert qualifications, the Court must accept that an average juror would know the technical definition of "call forwarding," would understand 1-805-637-7249 corresponds to T-Mobile's default voicemail inbox, and would draw the inference Letterman drew about the meaning of Ms. Wright's records relative to her whereabouts on the night in question.

Even the savviest cell phone-subscribing juror would not know these things without guidance from a specialist. To hold otherwise would substantially blur the line between Rules 701 and 702. Moreover, the Supreme Court has been wary of the State's efforts to reclassify sophisticated police investigative techniques as common knowledge appropriate for lay witness testimony. Hamrick v. State, Op. No. 27886 (S.C. Sup. Ct. filed May 15, 2019) (Shearouse Adv. Sh. No. 20 at 19, 19-20). Whether an officer is attempting to reconstruct a vehicle collision or to explain how cell phone records place a suspect at a crime scene, the officer is utilizing specialized knowledge to offer opinion testimony, and the State must lay a foundation establishing the witness's qualifications before offering this testimony into evidence.

Finally, Respondent reaches outside South Carolina case law[1] to argue it is common practice to admit cell phone forensic and mapping testimony without requiring a witness to show

[1] Respondent does cite one unreported South Carolina Court of Appeals ruling. Resp't Br at 28 n. 17 (citing State v. McDonald, 2017 UP-285, 2017 WL 4791156 (S.C. Ct. App. July 12, 2017)). However, this citation is contrary to the appellate court rules and should not be considered. See

expert qualifications. Resp't Br. at 28 n. 17. It is true some testimony describing a cell phone record could be common knowledge but, as described above, Letterman's testimony went further and drew conclusions that could only be grounded in specialized knowledge. Additionally, a number of courts have held cell phone location testimony requires an expert. See e.g., State v. Payne, 104 A.3d 142, 155 (Md. 2014); Hall v. State, 123 A.3d 577, 588 (Md. App. 2015) ("cell phone plotting may only be admitted through expert records"); State v. Manzella, 128 S.W.3d 602, 608-09 (Mo. App. 2004) (while a cell phone customer could testify to the calls on his bill, his experience as a customer did not qualify him to testify regarding cell phone towers).

This is especially true when a state uses cell phone location data in an effort to approximate a suspect's location when a crime was committed or to place a suspect at a crime scene. State v. Ford, 454 S.W.3d 407, 414 (Mo. App. 2015) ("it was error here for the trial court to allow [officer] to testify as a lay witness that [suspect's] telephone connected to a cell tower close to the murder scene at the time of the murder"); State v. Patton, 419 S.W.3d 125, 132 (Mo. App. 2013) (ruling that allowing testimony on cell phone location "without the aid of specialized experience or knowledge in the field of cellular communication comes too close to mere speculation"). When a witness uses cell phone records for this purpose, he has gone beyond the ordinary use of such records and the lay juror's knowledge of their contents. Drawing conclusions on a person's

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Rule 268(d)(2), SCACR (stating that unpublished memorandum opinions have no precedential value "should not be cited except in proceedings in which they are directly involved"). The purpose for Rule 268(d)(2)'s bar on citing these rulings is borne out in this case. While Respondent claims McDonald shows the Court is inclined to permit cell phone mapping testimony by a non-expert, the memorandum opinion offers no reasoning to support that conclusion. Plus, it is not even clear McDonald was addressing the merits of that portion of the appeal. Instead, it appears the Court found the issue was unpreserved. McDonald, 2017 WL 4791156, at * 1 (citing State v. Berry, 418 S.C. 500, 504, 795 S.E.2d 26, 28 (2016) and State v. Holliday, 333 S.C. 332, 338, 509 S.E.2d 280, 283 (Ct. App. 1998)). Moreover, a memorandum opinion is by rule non-precedential and our Supreme Court has since spoken in Hamrick on the need for expert qualifications for sophisticated police investigative techniques.

location using cell phone records requires a person to understand (1) how cell towers communicate with cell phones; (2) how cell towers create cover areas; (3) the relationship between coverage areas and tower connections; and (4) the relative importance of physical proximity and non-proximity factors for determining whether a cell phone will connect to a particular cell tower. U.S. v. Banks, 93 F. Supp. 3d 1237, 1248-49 (D. Kan. 2015). Banks quite reasonably concluded "[t]hese issues are not familiar to the Court based on everyday experience." Id.; see also U.S. v. Yeley-Davis, 632 F.3d 673, 684 (10th Cir. 2011) ("testimony concerning how cell phone towers operate constituted expert testimony because it involved specialized knowledge not readily accessible to any ordinary person").

The fact that Letterman's testimony was grounded in cell phone records does not necessarily make his testimony about those records a matter of common knowledge. The Connecticut Supreme Court recently rejected that argument finding that, even though an officer based his testimony on records obtained from a cell phone provider, "the process he used to arrive at his conclusions was beyond the ken of average juror[s]." State v. Edwards, 156 A.3d 506, 526 (Conn. 2017); see also Wilder v. State, 991 A.2d 172, 198 (Md. App. 2010) (holding that state must "offer expert testimony to explain . . . the techniques of locating and/or plotting the origins of cell phone calls using cell phone records").

Therefore, the Court should reject Respondent's assertion that Letterman's testimony was admissible even if he lacked the qualifications to testify as an expert. Respondent never raised this argument at the circuit court level and South Carolina law requires a witness to be qualified as an expert before offering testimony based on knowledge beyond what is generally known by an average juror.

2. Letterman Lacked the Qualifications Needed to Serve as a Cell Tower Mapping Expert.

The circuit court qualified Letterman as an expert in "cell phone forensics and cell tower mapping." (R. p. 485, lines 4-6; 488, lines 5-7). The major thrust of Letterman's testimony was what he believed Ms. Wright's cell phone usage indicated about her location at key moments around the time Decedent was killed. The entire direct examination built to Letterman's conclusion about Ms. Wright's whereabouts which he purportedly derived from his analysis of her cell phone. (R. pp. 495-96). This testimony leans heavily on the "mapping" portion of Letterman's supposed expertise. Yet, it is in this area where his insufficient qualifications are at their lowest ebb. Letterman has far fewer qualifications than the expert in the primary case Respondent touts (State v. Peer[2]) and about the same insufficient qualifications of the proposed expert in the primary case Respondent attempts to distinguish (State v. Andrews[3])—and which the Supreme Court recently affirmed. Op. No. 27894 (S.C. Sup. Ct. filed June 19, 2019) (Shearouse Adv. Sh. No. 25 at 9-12).

Respondent cites Peer as a benchmark to prove Letterman's qualifications were sufficient, but Letterman has far fewer qualifications than the Peer expert. In that case, the officer was qualified as an expert in sound because he (1) conducted sound testing for 1 ½ years; (2) gained a certification in the equipment used to perform sound testing; and (3) performed a sound testing demonstration in the courtroom for the jury to see. 320 S.C. at 554, 466 S.E.2d at 380. In contrast, Letterman admitted he had been using the GeoTime software for cell phone mapping for just three months and he had never testified to or presented in a law enforcement setting on a case in which he personally participated in mapping. (R. p. 484, lines 9-11; R. p. 486, lines 14-22). Letterman did not testify to any certification in GeoTime and instead acknowledged the sum total of his

[2] 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996).
[3] 424 S.C. 304, 316, 818 S.E.2d 227, 234 (Ct. App. 2018).

official training on the software was a one-day class. (R. p. 485, lines 22-24). Moreover, Letterman did not offer anything like an in-court demonstration of the technique that led to his conclusion.[4] He basically did the opposite. Letterman told jurors that, despite being qualified as a cell phone mapping expert, he could not map text messages transmitted to Ms. Wright's phone during crucial moments and could not explain why his efforts to do so failed. (R. p. 497, lines 13-21).

Respondent now argues Letterman's important admission did not affect his qualifications. Resp't Br. at 31. However, if an in-court demonstration like in Peer is a factor favoring qualification, an in-court admission that the purported expert witness's process failed must be a factor disfavoring qualification. Respondent contends Letterman explained why the texts could not be mapped but cites no portion of the trial transcript to support this contention. Resp't Br. at 31. The lack of an explanation is an additional factor showing why Letterman should not have been labeled a cell phone mapping "expert" and allowed to offer testimony designed to convince jurors Ms. Wright was at the crime scene around the time Decedent was killed. Cf. Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 76-78, 735 S.E.2d 650, 656-57 (2012) (affirming exclusion of purported software experts who offered no explanation for how allegedly defective device's software failed).

In total, Letterman's qualifications are less like the expert in Peer and more like the rejected expert in Andrews. The officer in Andrews cited as expertise his extended service as a law enforcement officer and a one-week training class. 424 S.C. at 317, 818 S.E.2d at 234. This Court affirmed a circuit court order excluding the expert and ruled that, even with his experience, the short training class was "insufficient qualification." Id. at 310, 818 S.E.2d at 231. On appeal, this

[4] This is in sharp contrast to Ms. Wright's cell phone mapping expert who presented the jury with a computer model to demonstrate the accuracy of his analysis. (R. p. 417).

Court focused on two things in affirming the proposed expert's exclusion. First, his proposed qualifications were not specific to his testimony as most of the class covered general law enforcement issues or was even unrelated to the conclusions he offered at trial. Id. at 317, 818 S.E.2d at 234 Second, when the unrelated portions of the class were stripped away, the remaining instruction time (one day) was insufficient to make the officer an expert. Id. The same hold true here. Letterman's testimony was intended to boost Respondent's contention that Ms. Wright was at the crime scene and not at her alibi location.

Thus, the key qualification question was whether he had knowledge, training, and experience in mapping. On this specific process, Letterman had one day's training, no certifications, and no experience as an expert. Even adding in Letterman's instruction on Cellebrite, he had a total of six days' training on the cell phone forensic processes for which he was permitted to offer opinion testimony in a murder trial. (R. p. 485, line 17 – 486, line 2). This Court found a similar expert unqualified in Andrews, and the Supreme Court recently affirmed that ruling. Op. No. 27894 (S.C. Sup. Ct. filed June 19, 2019) (Shearouse Adv. Sh. No. 25 at 10-11). Hamrick is even further proof Letterman's minimal training is insufficient. There, the unanimous Supreme Court ruled an officer's multiple training courses over a period of years was not enough to make him an expert and the circuit court abused its discretion in admitting this testimony. Specifically, the Court held, "A law enforcement officer who attended several classes on the subject does not possess the necessary qualifications to satisfy the 'qualified as an expert' element of the Rule 702 foundation." Op. No. 27886, at 19.

In sum, since Letterman's qualifications were like the rejected experts in Andrews and Hamrick and unlike the expert in Peer, he should not have been admitted to testify at trial. Hamrick also shows that it is an abuse of a circuit court's discretion to qualify an expert under these

circumstances. Given Letterman's limited training on cell phone mapping and his unexplained inability to map key data points, he should not have been allowed to offer testimony designed to persuade jurors Ms. Wright was present at the crime scene.

3. Letterman's Insufficient Qualifications is an Admissibility Issue and Not Just a Factor Affecting the Weight Given to His Testimony.

Respondent's farthest-reaching argument is a direct attack on the threshold qualification requirement for expert testimony. Respondent argue all Ms. Wright's objections to Letterman's qualifications were simply matters for the jury to consider and did not amount to an admissibility question. Resp't Br. at 31 (arguing Ms. Wright's "remedy" for Letterman's deficient qualifications was cross-examination). Similarly, Respondent dismisses Ms. Wright's objection to Letterman as improperly focusing on the amount of his qualifications. Resp't Br. at 31 (claiming it was improper for Ms. Wright to argue that she "did not think [Letterman] had sufficient qualifications"). These arguments overlook two crucial principles of South Carolina law. First, courts must determine whether a proposed expert is qualified before he is permitted to take the witness stand. Second, the court's obligation includes a duty to examine the amount of a proposed expert's qualifications to determine whether they are sufficient to support admission.

Rule 702's language establishes qualification, reliability, and helpfulness as threshold requirements for expert testimony. A proposed expert "may testify" only "if" these three requirements are demonstrated first. Thus, by rule, courts are delegated the duty to serve as "gatekeeper" for proposed experts. Watson, 389 S.C. at 445, 699 S.E.2d at 174. As gatekeeper, the court must make three findings before the proposed expert offers any testimony to a jury. Along with determining whether expert testimony is needed and whether the proposed testimony's substance is reliable, a court must also "find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." Id. at 446,

699 S.E.2d at 175 (citing Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997)).

South Carolina courts have consistently held concerns over expert qualifications are threshold questions and not just matters affecting the weight to be afforded to the proposed expert's testimony. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008) (finding courts have crucial role "as the gatekeeper in determining both the qualifications of an expert and whether the expert's testimony will assist the trier of fact"). While disputes over qualifications can be presented to a jury should a court to admit an expert, the opportunity to cross-examine a witness on his experience or training is not a substitute for the threshold qualification finding Rule 702 and Watson require the court to make. The Supreme Court has specifically rejected Respondent's invitation to push the qualification debate on to a jury. Watson, 389 S.C. at 447, 699 S.E.2d at 175 (citing State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (finding the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked **only after the trial court has vetted the matters of qualifications** and reliability") (emphasis added)).

Respondent also errs by suggesting the threshold qualification question does not include the sufficiency of a proposed expert's qualifications. It is not enough that Respondent offered *some* basis to claim Letterman had specialized knowledge on computer forensics and cell phone mapping. It was incumbent on the circuit court to probe all of the proposed qualifications to see whether they were enough to allow Letterman's conclusions to reach the jury. State v. Chavis, 412 S.C. 101, 106-07, 771 S.E.2d 336, 339 (2015) ("First, the qualifications of the expert must be sufficient . . ."). That was the approach taken in Andrews and Hamrick. The Andrews proposed expert offered evidence of his experience and a one-week class he attended, but the circuit court

deemed the class "insufficient qualification" and both this Court and the Supreme Court agreed. 424 S.C. at 310, 818 S.E.2d at 231; Op. No. 27894 (S.C. Sup. Ct. filed June 19, 2019) (Shearouse Adv. Sh. No. 25 at 10-11). The officer in Hamrick pointed to multiple training courses he took over a period of several years, but the Supreme Court ultimately concluded the officer's training was "limited" and he lacked the "necessary qualifications" to be admitted as an expert. Op. No. 27886 (S.C. Sup. Ct. filed May 15, 2019) (Shearouse Adv. Sh. No. 20 at 19).

Therefore, it is wrong for Respondent to dismiss Ms. Wright's argument that she "simply did not think [Letterman] had sufficient qualifications." Resp't Br. at 31. That is a proper objection to raise in the face of a proposed expert with limited training on the subject matter of his testimony and it directly invokes the circuit court's gatekeeping duty to prevent unqualified witnesses from garnering the valuable "expert" label. The Court should reject Respondent's attempt to water down the expert qualification standard from the threshold requirement Rule 702 and South Carolina law has consistently required. As explained above, Letterman had no more relevant qualifications than the proposed experts rejected in Andrews and Hamrick, and the circuit court abused its discretion in allowing an officer with one-day's training on cell phone mapping to offer testimony on a criminal defendant's whereabouts in an effort to tie her to the scene of a murder.[5]

[5] Respondent argues the remainder of Ms. Wright's "qualification" challenge is unpreserved (Resp't Br. at 32) but this argument fails to account for how South Carolina courts describe expert "qualification" requirements. As stated in Chavis, when ruling on the "qualification" of experts, a court must consider both whether the proposed expert has sufficient qualifications; and (2) whether the proposed expert's testimony will be reliable. 412 S.C. at 106-07, 771 S.E.2d at 339. Moreover, Ms. Wright's objections at the start of Letterman's testimony went beyond just the sufficiency of his qualifications. (R. p. 487, lines 16-17) ("we would object to his qualifications as an expert **and his testimony**") (emphasis added). As a bottom line, precedent holds that it is a "good practice" to reach the merits of an issue even with error preservation is doubtful. Johnson v. Roberts, 422 S.C. 406, 812 S.E.2d 207 (Ct. App. 2018) (citing Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 730 S.E.2d 282, 285 (2012)).

4. Respondent Artificially Segmented Letterman's Testimony in an Effort to Complete its Case-in-Chief on Rebuttal.

Letterman's second round of testimony was not limited to rebutting Ms. Wright's evidence, and the trial transcript shows Respondent held back this testimony from Letterman's initial appearance in an effort to complete its case-in-chief on reply. As this Court recently held, it is reversible, not harmless error to admit an expert on reply who goes beyond the specific evidence offered by an opponent to present evidence the proponent should have offered in its original presentation.

Initially, Respondent incorrectly claim Ms. Wright's rebuttal-based issue is not preserved because she offers a "different theory" in her brief than was included in her objection at trial. Resp't Br. at 36 (citing State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989)). Respondent contends the trial objection was limited to Letterman's qualifications. Resp't Br. at 36. In other words, Respondent asks the Court to find Ms. Wright's rebuttal objection was effectively indistinguishable from her qualification objection such that she should be permitted only one issue on appeal. Respondent errs because it misreads Ms. Wright's objections and omits key context showing the scope of the issues raised to the circuit court. Along with concerns over Letterman's qualifications which were explored during *voir dire*, Ms. Wright's trial counsel objected to because Letterman was "previously called as a witness." (R. p. 487, lines 9-12). This objection reasonably implies the testimony Letterman was about to offer should have been included in Respondent's case-in-chief.

If there was any ambiguity as to whether Ms. Wright had one or two objections to Letterman, Ms. Wright's attorney dutifully sought confirmation that the circuit court understood her distinct motion "not to allow [Letterman] as a rebuttal witness." (R. p. 488, lines 12-14). This follow-up ensured the circuit court entered a distinct order on this separate objection. (R. p. 488,

lines 15-17). This fuller context shows the errors in Respondent's preservation argument. Ms. Wright is not offering a different theory on appeal than was offered at trial, and Respondent should not be permitted to turn issue preservation rules in to a "gotcha game" to avoid the merits of Ms. Wright's properly-raised objections. Johnson v. Roberts, 422 S.C. 406, 411, 812 S.E.2d 207 (Ct. App. 2018) (finding "any doubt should be resolved in favor of preservation" and rejecting preservation argument even though "the factual theory Appellant presented to the circuit court is not identical to the factual theory she argues here").

As to the merits, Respondent argues Letterman's opinions were proper rebuttal testimony because they covered the same general subject matter as Ms. Wright's defense. Resp't Br. at 38-39. However, Letterman's rebuttal testimony addressed issues never discussed by the cell phone mapping expert he was purportedly recalled to rebut. Appellant's Br. at 14-15. Moreover, rebuttal testimony is not proper simply because it is in the same ballpark as an opponent's theory of the case. This Court recently reversed a murder conviction because a proposed rebuttal expert's presentation "was not limited to refuting or rebutting **specific testimony**" from the defendant. State v. Prather, 422 S.C. 96, 107, 810 S.E.2d 419, 425 (Ct. App. 2017) (emphasis added). Rebuttal expert testimony must be reasonably constrained by the specific evidence or testimony offered by an opponent and may not venture into "general testimony as to the circumstances of the crime." Id.

When a witness like Letterman or the expert in Prather expand beyond refutation and into general expert testimony, he risks running afoul of the long-standing rule preventing a party from using rebuttal to complete its case-in-chief. State v. Huckabee, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). That rule is especially apt here since Letterman's rebuttal testimony was his second appearance and any cell phone forensics or mapping conclusions he intended to offer fit

naturally into his initial testimony. R. pp. 349-54) (discussing Letterman's extraction of Ms. Wright's phone using Cellebrite, his analysis of call logs, and the technical capabilities of the phone). Ultimately, the error requiring reversal in Prather is mirrored in Letterman's testimony. He was allowed to testify in areas going beyond proper rebuttal testimony, and the context shows Respondent's purpose in recalling Letterman was to complete its case-in-chief.

5. Improperly Admitted Evidence on a Criminal Defendant's Purported Location at the Time of a Murder is not Harmless Error.

Improperly admitted testimony cannot be harmless error when it goes to the heart of the case. In re Care & Treatment of Thomas S., 402 S.C. at 379, 741 S.E.2d at 30 (citing State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001)). The question at the heart of this case was whether Ms. Wright was present at the crime scene when Decedent was killed. Respondent's brief could leave a misleading impression about just how contested that question actually was. Ms. Wright's statement to police was that she was with friends in another town at the time of the murder. (R. pp. 154-57).

The only witness who placed Ms. Wright at the crime scene (Brandon Blackwood) is an admitted liar who confessed multiple times to the crime he now accuses Ms. Wright of and who would have faced his own murder trial if not for his testimony leading to Ms. Wright's conviction. Respondent needed some other seemingly-objective evidence to either bolster Blackwood's fundamentally shaky testimony or to independently suggest Ms. Wright was at the crime scene at the time Decedent was killed. Thus, evidence related to Ms. Wright's cell phone became a crucial component of the evidence Respondent used to gain a conviction. The trial transcript bears this out. Respondent viewed cell phone mapping evidence to be important enough that it devoted its only rebuttal evidence to readdressing the issue with the jury. Then, during closing arguments, Respondent devoted 4 ½ pages to cell phone data to suggest Ms. Wright was at the scene of the

crime. (R. pp. 516-20). In turn, Ms. Wright's counsel argued her position on what the cell phone data said about Ms. Wright's location at key moments and what those locations meant for Respondent's ability to meet its burden of proof. (R. pp. 534-35). Respondent's hindsight argument that Letterman's testimony "could not reasonably have affected the result" of the trial is not consistent with how the parties treated that testimony during the trial.

Respondent's harmless error argument is flawed for other reasons. First, Respondent largely dismisses Blackwood's massive credibility problems by claiming his testimony was corroborated by other witnesses. Resp't Br. at 43. But, as Respondent admitted at trial, there is no corroboration for Blackwood on the "heart of the case" question. No one corroborated Blackwood's testimony placing Ms. Wright at the crime scene and putting her behind the wheel of the truck that hit Decedent. R. p. 515, line 25 – 516, line 2). It is no coincidence that after acknowledging this potential flaw during its closing argument, Respondent immediately began discussing cell phone evidence and the alleged support it offered Blackwood's statements. (R. pp. 516-18). Second, Respondent dismisses Blackwood's confessions by claiming he had no motive to kill Decedent. Resp't Br. at 44 n. 23. Respondent overlooks the fact that, according to a witness who saw Blackwood in the hours before the incident, he volunteered to kill Decedent. (R. p. 140, lines 15-20). Third, Respondent's brief could leave the Court with the impression Ms. Wright was the only one who harbored ill will toward Decedent. However, multiple witnesses testified Decedent had several enemies including men who threatened him with a lead pipe or metal wand and a disgruntled drug dealer with whom Decedent had an earlier dispute. (R. pp. 87, 297).

Thus, the jury was presented with crucial questions when deciding whether Ms. Wright was guilty of murder. They had to find she was present at the crime scene and that it was her rather than Blackwood who struck Decedent with the vehicle. Both of these key questions were contested

by evidence Ms. Wright presented. Respondent used Letterman's cell phone mapping testimony to counter this evidence and to prop up Blackwood's inherently unreliable statements. Placing the defendant at the crime scene was a crucial part of the Respondent's burden in this case and cell phone location evidence can have a "compelling" effect on the jury's perception of this issue. Wilder v. State, 991 A.2d 172, 200 (Md. 2010). Even a case Respondent's brief cites multiple times rejects its efforts to minimize the importance of Letterman's testimony. See Resp't Br. at 29, 35 (citing Collins v. State, 172 So.3d 724 (Miss. 2015)). Collins held that an officer's improper testimony on cell phone location data was "obviously" not harmless since its purpose was to place a criminal defendant "in the same geographic area at the time of the murder." 172 So.3d at 744. The issue was too important and Letterman's testimony too crucial to dismiss the errors as harmless.

CONCLUSION

Based on these arguments and those in her earlier brief, Ms. Wright respectfully requests the Court reverse the circuit court and remand for a new trial. The circuit court abused its discretion by admitting an expert with no more qualifications than the experts recently rejected by the Supreme Court in Andrews and Hamrick. The circuit court also abused its discretion by permitting a rebuttal expert to offer testimony that did not rebut specific evidence Ms. Wright offered. Ms. Wright faces a thirty-year prison sentence in no small part because of this improperly admitted evidence, and a new trial is the only proper remedy.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

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Appellate Case No. 2017-002531

State of South Carolina, ... Respondent

v.

Angelita Nicole Wright, ... Appellant.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211, SCACR, Appellant's counsel certifies that the Appellant's Brief and Reply Brief comply with Rule 211(b), SCACR.

Respectfully submitted,

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