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S.C. SUPREME COURT

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari to the Court of Appeals
Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
Opinion No. 2022-UP-197 (S.C. Ct. App. Filed May 18, 2022)

THE STATE,

Respondent,

vs.

KENNETH WAYNE CARLISLE,

Petitioner.

Appellate Case No: 2022-001002

RETURN TO PETITION FOR WRIT OF CERTIORARI

**ALAN WILSON
Attorney General**

**DONALD J. ZELENKA
Chief Deputy Attorney General**

**MELODY J. BROWN
Senior Assistant Deputy Attorney General**

**WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General**

**P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305**

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err in finding that the trial judge properly admitted a photograph of decomposed skeletal remains when any probative value of the photograph was substantially outweighed by the danger of unfair prejudice?
2. Did the Court of Appeals err in finding that the trial judge properly admitted eight autopsy photos when the probative value of the photograph was substantially outweighed by the danger of unfair prejudice?

COUNTER-STATEMENT OF ISSUES PRESENTED

- I. Whether this Court should deny certiorari because because the Court of Appeals properly found that the trial judge did not abuse his discretion by allowing the State to introduce State's Ex. 50, a photograph of the victims' remains taken at the location where they were found, where the photograph depicted the victims as they were left by the defendants and their positions relative to each other, it corroborated testimony from several witnesses, it was probative of the element of malice, and the probative value of this photograph was not substantially outweighed by the danger of unfair prejudice to Petitioner?
- II. Whether this Court should deny certiorari because assuming *arguendo* that Petitioner's challenge to the probative value of the photographs is preserved for appellate review, the trial judge did not abuse his discretion by allowing the State to introduce eight autopsy photographs accurately depicting the victims' injuries (State's Exs. 58-59, 61-64, 66 and 128) through the pathologist who conducted the autopsy because these photographs corroborated and illustrated the pathologist's findings, they were probative on the issue of malice, and their probative value was not substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

Respondent accepts Petitioner's "Statement of the Case" for purposes of this Return.

STATEMENT OF FACTS

Respondent adopts the "Statement of Facts" from the Final Brief of Respondent. See FBOR at pp. 1-19 facts for purposes of this Return. *See App. 1715-27.*

STANDARD OF REVIEW

In *S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373 (2020), this Court explained its discretionary certiorari review of decisions by the Court of Appeals as follows:

This Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion. *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170, 170 (2008); *In re Exhaustion of State Remedies in Criminal Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990). Further, Rule 242(b), SCACR, emphasizes the discretionary authority of the Court to review decisions of the court of appeals, stating a writ of certiorari will be granted only when there are special and important reasons, such as when there are novel questions of law; a dissent in the decision of the court of appeals; the decision of the court of appeals is in conflict with a prior decision of this Court; substantial constitutional issues are directly involved; or a federal question is included, and the decision of the court of appeals conflicts with a decision of the United States Supreme Court.

Respondent submits that no special circumstances exist for either of the issues presented by Petitioner. Rather, appellate courts sit to review errors of law only in criminal cases, *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001), and an appellate court is bound by a trial judge's factual findings unless they are clearly erroneous. *Id.* at 6, 545 S.E.2d at 829. The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. *State v. Bridges*, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011)). "To warrant reversal, an error must result in prejudice to the appealing party." *Id.* at 16-17, 732 S.E.2d at 884.

ARGUMENTS

I. The Court should deny certiorari because the Court of Appeals properly found that the trial judge did not abuse his discretion by allowing the State to introduce State's Ex. 50, a photograph of the victims' remains taken at the location where they were found, where the photograph depicted the victims as they were left by the defendants and their positions relative to each other, it corroborated testimony from several witnesses, it was probative of the element of malice, and the probative value of this photograph was not substantially outweighed by the danger of unfair prejudice to Petitioner.

Notwithstanding Petitioner's argument to the contrary, Respondent submits that the Court of Appeals correctly found that the trial judge did not abuse his discretion by allowing the State to introduce State's Ex. 50, a photograph of the victims' remains taken at the location where they were found. *See App. 2*. Unlike the crime scene photographs admitted without objection (State's Exs. 51 and 52), this photograph depicted the victims as they were left by the defendants and their positions relative to each other. It also corroborated testimony from several witnesses, and it was probative of the element of malice. Further, the probative value of this photograph was not substantially outweighed by the danger of unfair prejudice to Petitioner.

As discussed, the victims' remains were discovered on July 15, 2017, in woods near Browns Chapel landing. The State sought to introduce photographs from the scene as State's Exs. 50-52. Although neither defendant objected to State's Ex. 51 or State's Ex. 52, both defendants objected to State's Ex. 50 and the trial judge heard their objections outside of the jury's presence. *R. 372-73*. Hodge argued that the photograph should be excluded because it depicted "a partial skeletal remain" and was "graphic." She further argued that it was extremely prejudicial because it was in color and a close-up. *R. 374*.

Petitioner joined in Hodge's objection and argued that:

Your Honor, all I would add and I would join in Mr. Wilson's objection here is that ... the prejudicial effect would be the potential to inflame the passions of the jury by seeing this body in a decomposed state, in a decomposed manner in a

photo that I believe has very limited probative value to what the State is seeking to prove, which is the location of where the bodies were found. I believe that are least restrictive, less prejudicial matter -- manner in which the State could present that evidence. So I believe under State v. Collins¹] it would be inappropriate to introduce that photo into evidence as it currently sits.

R. 374-75.

The State pointed out that unlike the other photographs, State's Ex. 50 showed the victims' "bodies uncovered ... [and] exactly how they were found." It also depicted the position of the bodies relative to each other, which State's 51 and 52 did not, and this would allow the State to argue how they were carried there. **R. 375.**

Applying *Collins*, the trial judge overruled the defendants' objections because he found that State's Ex. 50 was "clearly relevant" and that it "simply mirrors the unfortunate reality of this case." He further found that a photograph is not inadmissible simply because it is gruesome. He also found that State's Ex. 50 corroborated testimony and that it was being introduced to show "the unaltered condition of the victims upon finding their remains." **R. 375-76.** He then observed that the Supreme Court in *Collins* cited an Arkansas case that

stands for the proposition that even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony or, or if they are essential in proving a necessary element of a case or useful to enable a witness to testify more effectively or enable the jury to better understand the testimony. Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries and the position in which the bodies were discovered.

R. 376-77.

When the jury returned, the State moved to introduce all three photographs and the trial judge noted that State's Ex. 50 was admitted over objection. **R. 378, lines 18-21.** Inv. Caulder

¹ See *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014) (trial judge's admission of pre-autopsy photographs of the victim, who had been mauled by dogs, was not an abuse of discretion).

thereafter testified that State's Ex. 50 depicted "the victims in their state after ... the brush and ... wood had been removed." It likewise accurately depicted the position in which they were found. *R. 379, line 20-380, line 1.*

While the State did not refer to State's Ex. 50 in closing argument, the State emphasized several times that the victims' bodies were found in the woods near Browns Chapel landing, the location where they were "dumped." The State also pointed to Dr. Schandl's testimony regarding the condition both bodies were in when found in the humid area and exposed to July heat. The State argued that these facts showed malice and that the defendants had committed the murders. *See R. 703, line 1 – 705, line 15; 708, lines 6-9; 713, lines 4-5.* The State further argued that:

I'll tell you what certainly didn't happen is it wasn't [a] murder suicide. To believe that you'd have to believe that there was a murder or suicide, then those corpses got back in the truck, remember who put the hat on by the way, and then walked to the landing with the truck still back and the hat. That's about how valid a murder suicide argument could be here, walking up to any bodies.

R. 715, lines 10-16.

Petitioner cannot show an abuse of discretion. Generally, all relevant evidence is admissible. Rule 402, 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." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Rule 403, SCRE. The applicable standard for the admissibility of photographs is correctly set forth in *State v. Heyward*, 432 S.C. 296, 852 S.E.2d 452 (Ct. App. 2020), *reh'g denied* (Jan. 15, 2021):

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). A trial court's "decision regarding the

comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). In balancing the danger of unfair prejudice with the probative value of a piece of evidence, “the determination must be based on the entire record and will turn on the facts of each case.” *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).

“To be classified as unfairly prejudicial, photographs must have a ‘tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’ ” *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). “[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial.” *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). However, “[i]t is well settled in this state that ‘[i]f the [...] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.’ ” *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (first alteration in original) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353). Our courts have found autopsy photographs may be admitted “in an effort to show the circumstances of the crime and character of the defendant.” *Id.* “ ‘The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.’ ” *Collins*, 409 S.C. at 535, 763 S.E.2d at 28 (quoting *Nichols v. State*, 267 Ala. 217, 100 So. 2d 750, 756 (1958)).

Heyward, 432 S.C. at 321, 852 S.E.2d at 464-65.

Unlike the crime scene photographs admitted without objection – State’s Exs. 51 and 52 - State’s Ex. 50 depicted the victims in precisely the position as they were left by the defendants, as well as their positions relative to each other, after law enforcement had removed the wood and other debris under which their bodies had been secreted. Also, this photograph corroborated the testimony of Britzi Waddell as to where she and her friends found the bodies (**R. 251-53**), and Cpl. Adan Skellett’s testimony as to where the campers pointed the bodies out to him. **R. 255-56**. Further, it corroborated the testimony of Inv. John Caulder, who photographed the scene that the victims’ bodies were “badly decomposed” and were covered with brush and wood debris. **R. 371-72; 378-81**. See *State v. Hawes*, 423 S.C. 118, 130-31, 813 S.E.2d 513, 519-20 (Ct. App.

2018) (the trial judge did not abuse its discretion by admitting crime scene photographs that established the circumstances of the crime scene, corroborated the testimony of a witness and a responding officer, and were relevant to the issue of malice). Also, when viewed with the GPS testimony (*R. 595-600; 599-602; 609-12*) and other evidence presented by the State, it was circumstantially probative of the victims' identity.

Moreover, the State indicted Petitioner and Hodge for murdering the victims. *See R. 784-85*. This required the State to prove that he and Hodge killed them "with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). *See also State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013); *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715, 719 (1946). Contrary to Petitioner's argument, State's Ex. 50 was very probative of the element of malice,² since it showed that the victims' bodies had been secreted in a wooded area near the Waccamaw River in July, so that the ravages of both extreme heat and high humidity would escalate their decomposition and make identification of their bodies more difficult. *See People v. Garceau*, 6 Cal.4th 140, 181, 24 Cal.RpR.2d 664, 667, 862 P.2d 664, 667 (1993) (photograph of mummified victims hidden within a dresser was highly probative because it corroborated testimony relating to concealment of the bodies); *Cf. id.* at 131, 813 S.E.2d at 520 (noting "the crime scene photographs were relevant to the issue of malice because they showed how, where, and how many times [the victim] was attacked").

² "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987)." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002). *See also State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000) ("[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it").

Nor was the probative value of State's Ex. 50 substantially outweighed by its prejudicial effect under Rule 403, SCRE. It was highly probative of the matters enumerated above. Petitioner contends the photograph "was calculated to arouse the sympathy of the jury." Yet, this photograph did not confuse the issues or mislead the jury. Instead, it merely depicts the scene where the victims were found and the condition of the victims' bodies resulting from the actions of Petitioner and Hodge. *See Williams v. State*, 301 S.W.3d 675, 693 (Tex. Crim.App. 2009) (close-up photos of injuries were gruesome but they portrayed no more than the gruesomeness of the injuries inflicted by the defendant); *Narvaiz v. State*, 840 S.W.2d 415, 430 (Tex. Crim.App. 1992) (although photographs were gruesome, they merely depicted the gruesomeness of the crime scene as found by the police). Also, the State did not expressly rely upon it in closing argument.

Particularly in this day and age, where forensic matters are graphically shown in various and sundry popular prime time television programs and documentaries - such as "Forensic Files," "CSI" and its spin-offs, 48 Hours, Dateline, and similar programs - and when many people annually choose to adorn their residences with skeletons for Halloween, the jurors simply would not be so shocked by these photographs or the autopsy photographs discussed, *infra*, that they would have rendered a verdict based on an emotional basis.

Finally and to the extent the Court finds that the trial judge erroneously allowed the prosecution to introduce State's Ex. 50, any error in its admission could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can

be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result”). “Whether an error is harmless depends on the circumstances of the particular case.” *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012).

Here, any error must be viewed as harmless and non-prejudicial because, at worst, this photograph was cumulative to the testimony which it corroborated. The admission of improper evidence is harmless when the evidence is merely cumulative to other evidence. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003). *See also State v. Brazell*, 325 S.C. 65, 79, 480 S.E.2d 64, 72 (1997) (“Even if the descriptive testimony of the prosecution’s witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage”) (citing *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587 (1942) (finding the photographs unnecessary but harmless because they were not prejudicial or inflammatory)).

Further, the guilt of both Petitioner and Hodge was conclusively established beyond any reasonable doubt. “Where ‘guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,’ an insubstantial error that does not affect the result of the trial is considered harmless.” *State v. Brown*, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018) (quoting *State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011)). The State presented inconsistent and materially false statements by both defendants, photographic surveillance at the BB&Ts (where cash was withdrawn from the victims’ joint account), receipts and video surveillance from area Walmarts where the defendants purchased goods and received cash withdrawals from the victims’ joint account, testimony and a receipt from the Advance Auto, testimony from the man who sold what the State theorized was the murder weapon to Petitioner and Hodge, testimony of the defendants’ roommate at the time, and perhaps most

damning evidence of all, the GPS information from Linda's truck, that placed the truck in the area where the bodies were found on the night of July 3rd and which circumstantially corroborated trips to Walmart and the BB&Ts. Although this was a circumstantial evidence case, all that was missing was an eyewitness to the murders and the defendants' secreting the victim's bodies near the landing. Therefore, Petitioner is not entitled to relief.

II. Assuming *arguendo* that Petitioner's challenge to the probative value of the photographs is preserved for appellate review, the Court should deny certiorari because the trial judge did not abuse his discretion by allowing the State to introduce eight autopsy photographs accurately depicting the victims' injuries (State's Exs. 58-59, 61-64, 66 and 128) through the pathologist who conducted the autopsy because these photographs corroborated and illustrated the pathologist's findings, they were probative on the issue of malice, and their probative value was not substantially outweighed by the danger of unfair prejudice.

Assuming *arguendo* that Petitioner's challenge to the probative value of the photographs is preserved for appellate review even though it was not presented to the trial judge, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce eight autopsy photographs accurately depicting the victim's injuries (State's Exs. 58-59, 61-64, 66 and 128) through the pathologist who conducted the autopsy because these photographs corroborated and illustrated the pathologist's findings, they were probative on the issue of malice, and their probative value was not substantially outweighed by the danger of unfair prejudice.

When the prosecution moved to introduce State's Exs. 58-61 during Dr. Schandl's testimony, both defendants stated the photographs were admitted "subject to a sidebar." *R. 480, lines 15-22*. Similar objections were made when the State moved to introduce State's Exs. 127-128 (*R. 482, lines 4-21*), State's Exs. 62-64 (*R. 482, line 13 – 486, line 2*), and State's Ex. 66 (*R. 488, lines 13-18*).

During a subsequent break in the trial testimony, the trial judge placed on the record that there had been a sidebar with counsel before Dr. Schandl testified at which the trial judge

informed counsel that he was admitting the challenged photographs but excluding three others. The excluded photographs, State's Exs. 57, 60 and 65, showed the "frontal portion of each of the victim's skull" and a photograph of the arm that had the metal rod in it." He then gave each defendant an opportunity to place the objection on the record. *R. 504, line 10 – 505, line 9.*

Hodge argued that "those photographs were unduly prejudicial, especially in light of the fact that they were in color, some of them." She also claimed the same evidence could be presented "without creating the amount of prejudice ... to the Defendant" resulting from admitting the photographs. *R. 505, lines 12-18.* Petitioner joined in this objection. *R. 505, lines 20-21.* Although the trial judge pointed out that only black and white photographs were introduced (*R. 505, line 22 – 506, line 7*), Hodge maintained her objection. When she stated that one photograph depicted a metal rod, the trial judge noted this photograph had been removed. *R. 506, line 8 – 507, line 7.*

The trial judge then placed his extensive findings on the record:

Well, ... let me point out the fact, and I've kind of hit on it earlier in the photographs where the bodies were found and the photographs that were taken and were admitted into evidence at that point in time, pursuant to State v. Collins, the Court believes that each of these photographs that were admitted, 58, 59, 61, 62, 63, 66 and 128 ... were the least, so to speak, prejudicial photographs that could be admitted into evidence. I understand that these photographs do show skeletal remains. Again, that was, that was the condition that ... the bodies were found in. 58, as testified to -- by Dr. Schandl, showed an entry wound of the bullet on the left side of the skull. 59 showed the right side of the skull with the exit wound, along with the measurement of such on the exit side. 61 is a photograph of the top of the skull with the metal rod ... through the skull showing the trajectory of that bullet. 62 was simply photographs with -- and each of these photographs have identifying information on them as testified by Dr. Schandl identifying them as Mr. Clemons or Ms. McAllister's remains, but 62 was an upper and lower jaw of Mr. Clemons reflecting that he did not have any teeth, which was corroborated by earlier testimony. 63 was an entry wound on the left side of a skull, again with a measurement and identifying number as testified by Dr. Schandl. 64 is the opposite side of the skull indicating the exit wound with a measurement of such exit. 66 was, again, a picture of the top of the skull with the

measurement, ... with an identifying marker identifying the respective victim along with a metal rod showing trajectory of bullet and 128, which is admitted, was simply a -- an x-ray taken of Ms. McAllister's frontal skull which showing the location of a bullet that was located in her hair as testified to by Dr. Schandl, and as previously said, even the most gruesome photographs are admissible as stated previously if they tend to shed light on any issue or to corroborate testimony. In retrospect, the Court could have let, I believe, State's Exhibit 57 which showed the metal rod, where it kept that out. Furthermore, these photographs shed light on and give character to other evidence in the case. There's no testimony, I mean, these photographs showed unaltered conditions of the victims as they were viewed in, in autopsy conducted by Dr. Schandl. They show the nature and extent of each of the victim's injuries and provide evidence as to what happened on the date that these individuals lost their lives, and therefore, pursuant to such I do not believe that the prejudicial effect outweighs any probative value in this case, but each of you gentlemen's ... objections ... are so noted for the record.

R. 507, line 8 – 509, line 5.

Respondent initially submits that the Court of Appeals erred by addressing the merits of Petitioner's second argument (*see App. 3*) because his challenges to the probative value of State's Exs. 58-59, 61-64, 66 and 128 were not preserved for appellate review since these same arguments were not presented to the trial judge. As shown, Petitioner joined in co-defendant Hodge's objection, which was that the photographs were more prejudicial than probative. She also based her objection on the mistaken impression that the State was introducing color photographs and one depicting a metal rod in Linda's arm. Yet, those photographs (State's Exs. 57, 60 and 65) were excluded.

Because an objection must first be presented to and ruled upon by the trial judge to be preserved for appellate review, and because a party on appeal may not argue one ground at trial and a different ground on appeal, Petitioner's challenge to the probative value of the photographs is not preserved for review. *See State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed

upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal”); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“A party may not argue one ground at trial and an alternate ground on appeal”).

Alternatively, Respondent submits that Petitioner cannot show an abuse of discretion in the trial judge’s ruling. Again, “[t]he relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court,” *Nance*, 320 S.C. at 508, 466 S.E.2d at 353 (1996), and a trial judge’s “decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28. “[T]he [Rule 403] determination must be based on the entire record and will turn on the facts of each case.” *Lyles*, 379 S.C. at 338, 665 S.E.2d at 206.

“To be classified as unfairly prejudicial, photographs must have a ‘tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’ ” *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). “[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial.” *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). However, “[i]t is well settled in this state that ‘[i]f the [...] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.’ ” *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (first alteration in original) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353). Our courts have found autopsy photographs may be admitted “in an effort to show the circumstances of the crime and character of the defendant.” *Id.* “ ‘The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.’ ” *Collins*, 409 S.C. at 535, 763 S.E.2d at 28 (quoting *Nichols v. State*, 267 Ala. 217, 100 So. 2d 750, 756 (1958)).

Heyward, 432 S.C. at 321, 852 S.E.2d at 464-65.

Here, the trial judge correctly stated what each photograph depicted. Further, and despite Petitioner’s hyperbole as to what is depicted in the photographs, the trial judge correctly found that Dr. Schandl used the photographs to corroborate and illustrate her findings. Further, Dr.

Schandl testified that the photographs would help her explain her findings to the jury. *See, e. g., R. 478, lines 16-21*. State's Exs. 58 and 59 corroborate and illustrate her findings with respect to the entrance and exit wounds on Linda's skull, including the size of those wounds. State's Ex. 61 clearly illustrates her finding with respect to the trajectory of the bullet wound to Linda's head. State's Ex. 62, which depicts Chet's upper and lower jaw without any teeth, was probative of identity because Chet had previously had all of his teeth removed. This photograph of her findings corroborated the kinship DNA. *See R. 204-05* (testimony of William Clemmons, Jr.); *484-85* (testimony of Dr. Schandl). State's Exs. 63 and 64 corroborate and illustrate her findings with respect to the entrance and exit wounds on Chet's skull, including the size of those wounds. State's Ex. 66 clearly illustrates her finding with respect to the trajectory of the bullet wound to his head. Finally, State's Ex. 128 is merely an x-ray corroborating her finding that she located a fired bullet in Linda's hair.

Nor was the probative value of these photographs substantially outweighed by their prejudicial effect under Rule 403, SCRE. First, the photographs were extremely probative of each of the matters discussed. They were likewise extremely probative on the element of malice. Second, the photographs were presented in the course of the Dr. Schandl's clinically scientific and almost educational discussion of her findings. For most of the photographs, Dr. Schandl explained precisely what was depicted, how the photograph supported her finding(s), and why the matter depicted in the photograph was significant. *See, e.g., Heyward*, 432 S.C. at 321, 852 S.E.2d at 464-65; *Collins*, 409 S.C. at 534, 763 S.E.2d at 28 (“A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances”) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App.2003)). *See also State v. Gray*, 408 S.C. 601, 612-16, 759 S.E.2d 160, 166-68 (Ct. App.

2014) (Court finding that three autopsy photographs that showed the victim's exposed skull and brain were probative because they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and the cause of death, and they were important to the State's ability to prove malice); *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (“It is well settled in this state that ‘[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it’”) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353)); *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009).

Relying on *Torres*, Petitioner contends that “[t]he solicitors in the present case pushed the envelope on admissibility in regard to the autopsy photos.” Yet, his contention in this regard lacks merit. *Torres* is readily distinguishable for several reasons. In *Torres*, the prosecution introduced sixteen autopsy photographs and a number of crime scene photographs of the victims in the **sentencing phase** of the appellant’s capital trial. *Id.* at 622, 703 S.E.2d at 228. Also, the photographs in *Torres* are far more graphic than those presently at issue, with some depicting the male victim’s skull crushed in completely and others showing the female victim’s eye was missing, her face was unrecognizable, her mouth was where her cheek should be, and her dental bridge was essentially sticking out of her neck. As this Court acknowledged in *Torres*, however, the scope of the probative value is much broader in the sentencing phase of a capital murder trial, than in the guilt phase. *Id.* at 623, 703 S.E.2d at 229.

Further, unlike the pre-autopsy photographs in *Collins*, the autopsy photographs here depicted precisely what Petitioner, personally, did to the victims and, with the exception of the photographs where a rod was utilized to demonstrate the wounds’ trajectory, nothing more.³

³ In *Collins*, the appellant was charged with involuntary manslaughter and three counts of owning a dangerous animal. At trial, the trial judge admitted into evidence seven pre-autopsy

Also, the trial judge excluded the more graphic photographs (State's Ex. 57, 60 and 65) and the challenged photographs are all black and white. Given the manner in which the photographs were presented, they would not "create a 'tendency to suggest a decision on an improper basis, ... [such as] an emotional one.'" *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

As this Court observed in *Collins*:

Courts and juries cannot be too squeamish about looking at unpleasant things, objects, or circumstances in proceedings to enforce the law and especially if truth is on trial. The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.

Collins, 409 S.C. at 535, 763 S.E.2d at 28 (quoting, without citations, *Nichols*, 267 Ala. 217, 100 So.2d at 756).

As discussed in Argument I, particularly in this day and age, jurors simply would not be so shocked by these photographs that they would have rendered a verdict based on an emotional basis. In addition to the above authorities, Respondent submits the following cases also support the trial judge's ruling. *E.g.*, *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) (black and white photograph of the victim's right upper chest with the breast exposed showing the

photographs of the child victim, who died of "extensive traumatic injury" after being severely mauled by dogs. *Collins*, 409 S.C. at 528-33, 763 S.E.2d at 25-27. This Court reversed, finding the circuit court erroneously admitted the photographs, and the error was not harmless. *Id.* at 533, 763 S.E.2d at 27. However, the Supreme Court reversed, with two members finding that the photographs were "highly probative, corroborative, and material in establishing the elements of the offenses charged; [their] probative value outweighed [their] potential prejudice; and the appellate court should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." *Id.* at 534-35, 763 S.E.2d at 28. Justice Kittredge, who was joined by Justice Hearn, concurred in the result. He found that the photographs were erroneously admitted but that any error was harmless and non-prejudicial. *Id.* at 539, 763 S.E.2d at 30 (Kittredge, J., concurring in result). Justice Pleicones dissented. *Id.* at 540, 763 S.E.2d at 30-31.

location of the bullet wound was admissible to corroborate pathologist's testimony regarding location of wound, and did not prejudice defendant, since there was explicit testimony that victim's blouse and brassiere had been removed by medical personnel when they arrived at scene in order to administer medical assistance); *State v. Jarrell*, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002) (upholding the admission of graphic autopsy photographs in homicide by child abuse case because they corroborated testimony and demonstrated the extent of the injuries); *State v Dial*, 405 S.C. 247, 260-61, 746 S.E.2d 495, 501-02 (Ct.App. 2013) (probative value of three autopsy photographs of five-month-old victim's head injuries was not outweighed by danger of unfair prejudice in prosecution for homicide by child abuse; where photographs were introduced to corroborate testimony of forensic pathologist who performed autopsy that victim's various injuries were inconsistent with an accidental injury as defendant claimed had occurred, and they were highly probative of whether victim was abused and whether abuse was cause of his death, both integral elements of charged offense); *State v. Nichols*, 325 S.C. 111, 121, 481 S.E.2d 118, 124 (1997) (admitting a photograph of the victim's face because it demonstrated the angle and distance from which the victim was shot).⁴

Finally, and to the extent the Court finds that the trial judge erroneously allowed the State to introduce one or more of these photographs, any error in its (or their) admission simply could not reasonably have affected the result of the trial, as required for reversal. *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596 (“Error in a criminal prosecution is harmless when it could not

⁴ Further, there is no merit to Petitioner’s contention that State's Ex. 128, the “x-ray showing the bullet and the necklace worn by Ms. McAllister is also prejudicial as it personalizes the deceased.” While there is nothing prejudicial about this photograph, whatsoever, Respondent submits that neither crime scene photographs nor photographs taken at autopsy are inadmissible because they personalize or humanize a victim. After all, a murder victim is a person whose life was maliciously ended by a wrongful act, intentionally and without just cause or excuse. *Tate*, 351 S.C. at 426, 570 S.E.2d at 527 (2002).

reasonably have affected the result of the trial”); *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584 (“When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result”). “Whether an error is harmless depends on the circumstances of the particular case.” *Tapp*, 398 S.C. at 389, 728 S.E.2d at 475.

Here, any error must be viewed as harmless and non-prejudicial because, at worst, these photographs were cumulative to the testimony which they illustrated and corroborated. The admission of improper evidence is harmless when the evidence is merely cumulative to other evidence. *See Haselden*, 353 S.C. at 197, 577 S.E.2d at 448-49; *Brazell*, 325 S.C. at 79, 480 S.E.2d at 72 (“Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage”) (citation omitted). Further, the guilt of both Appellant and Hodge was conclusively established beyond any reasonable doubt. “Where ‘guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,’ an insubstantial error that does not affect the result of the trial is considered harmless.” *Brown*, 424 S.C. at 493, 818 S.E.2d at 743 (quoting *Byers*, 392 S.C. at 447, 710 S.E.2d at 60). In light of the evidence set forth in the Statement of Facts and as discussed in Argument I, any error must be viewed as harmless and non-prejudicial. Thus, Appellant is not entitled to relief based on the admission of the autopsy photographs.

CONCLUSION

Respondent submits that certiorari should be denied for the foregoing reasons.

Respectfully submitted,


ALAN WILSON
Attorney General of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

S.C. Bar # 4806
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

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