

The Supreme Court of South Carolina

The State, Respondent,

v.

James Heyward, Petitioner.

Appellate Case No. 2021-000122

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S.C. SUPREME COURT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The State asks this Court to depart from its own precedent and precedent of the Supreme Court of the United States in upholding Petitioner’s conviction. Furthermore, the State mischaracterizes Petitioner’s argument and ignores facts in the record. Specifically, the State argues that the Court of Appeals’ novel reliance on Rule 901(b)(3), SCRE, for fingerprint authentication is proper, despite its failure to cite to any case law supporting this proposition. The State also encourages the Court to endorse the Court of Appeals’ departure from well-established case law and hold that a witness may serve as an “expert” on fingerprint authentication, even if that witness lacks certain foundational knowledge regarding the collection and maintenance of the fingerprints. The State also misapprehends certain facts in the record, which demonstrate that Petitioner’s shackles were visible to potential jurors seated in the first two rows of the gallery. (*See* Final Brief of Petitioner, at 11–12.) Despite the fact that Petitioner’s shackles could be seen by potential jurors, the State argues that this Court should depart from United States Supreme Court precedent and ignore the burden-shifting requirement articulated in *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007 (2005). The State also admits in its Brief that evidence introduced at trial about the operational capacity of the firearm was “superfluous” and irrelevant (a point with which the Court of Appeals agreed), but fails to apprehend how such error was harmful. Further, the State misconstrues Petitioner’s argument regarding the admittance of Petitioner’s alias “Abdul Muslim,” and fails to appreciate the religious prejudice associated with referring to Petitioner as “Muslim” repeatedly during trial. Finally, the State has not demonstrated how gruesome autopsy photographs were necessary to substantiate the element of malice, when other evidence, including extensive testimony from the State’s medical examiner was provided. Therefore, the Court should find the State’s arguments unpersuasive and reverse the Court of Appeals and trial court.

ARGUMENT

I. The New Jersey fingerprint card was not properly authenticated under South Carolina law and should never have been admitted at trial.

In its Brief, the State offers no explanation as to how fingerprint evidence may be authenticated and admitted in the absence of an explanation as to how fingerprints are taken, stored and maintained. Instead, the State's Brief cites to South Carolina's seminal case on fingerprint authentication, *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009), and highlights that the expert in *Anderson* testified as to (i) the correctional facility where and (ii) the date on which the fingerprints were taken. (Brief of Respondent, at 11.) Given the Court of Appeals' conclusion that there was no such testimony at Petitioner's trial, *see State v. Heyward*, 432 S.C. 296, 314, 852 S.E. 2d 452, 461 (Ct. App. 2020), ("[W]e agree the State failed to establish when and where the N.J. Fingerprints were taken . . ."), the New Jersey fingerprints were not properly authenticated under South Carolina case law and should not have been admitted at trial. As such, the Court of Appeals erred in affirming the trial court's admission of fingerprint evidence without the proper authentication required by South Carolina Rule of Evidence 901(a).

The State would urge this Court to ignore its own precedent in *Anderson* and adopt the Court of Appeals' novel authentication method for fingerprints under Rule 901(b)(3). However, no other South Carolina case cites Rule 901(b)(3) for the authentication of fingerprints¹ and the State offers no compelling reason as to why this Court should do so and depart from well-established law. Importantly, in the Section of its Brief entitled "*Authentication under 901(b)(3)*," the State does not cite to a single case where a court admitted fingerprint evidence that was authenticated under Rule 901(b)(3). (*See generally*, Brief of Respondent, at 13–16.) As

¹ A point conceded by the State as it cites to *other* subsections of Rule 901(b), SCRE, including Rule 901(b)(7) and 901(b)(9), that the Court of Appeals could have relied on for fingerprint authentication *instead of* relying on Rule 901(b)(3). (*See* Brief of Respondent, at 16.)

such, this Court should reject the State's argument and the Court of Appeals' holding that fingerprint authentication is appropriate under Rule 901(b)(3) and clearly articulate that this Court's decision in *Anderson*, which relies on Rule 901(a), SCRE, remains South Carolina's prevailing case on fingerprint authentication. *See Anderson*, 386 S.C. at 120, 687 S.E.2d at 35.

The State also argues that expert testimony may be used to authenticate fingerprint cards, and, therefore, Investigator Odom's testimony was sufficient to authenticate the New Jersey fingerprint cards. (Brief of Respondent, at 13.) However, the State fails to explain how Investigator Odom can be characterized as an expert with regard to authenticating the New Jersey fingerprint cards when she lacked foundational knowledge about when and where the fingerprints were collected and how they had been maintained and stored. *See Anderson*, 386 at 128, 687 S.E.2d at 39 (finding the burden of authentication satisfied where the fingerprint expert provided "testimony which substantiated the process used in obtaining and maintaining the fingerprint card"). For these reasons, this Court should disregard the State's argument and apply its own precedent and reverse the Court of Appeals with regard to the authentication and admission of the fingerprint evidence.

II. Potential jurors could see that Petitioner was shackled during the jury selection process and the denial of Petitioner's request to have his shackles removed was not harmless.

First, the State argues that Petitioner's shackles were not visible to the jury, and as such, the burden-shifting required by *Deck*, 544 U.S. at 622, 125 S.Ct. at 2007, does not apply. However, it is obvious from the record in this case that the shackles were visible, and the Court of Appeals noted that Petitioner "objected to being shackled at his feet, arguing any potential juror in the first two rows of the gallery directly behind him could see the shackles." *Heyward*, 432 S.C. at 327, 852 S.E.2d at 468 (emphasis added). On the record, Petitioner's trial counsel objected to Petitioner's shackling, stating:

We moved on Thursday of last week to prevent presumptive shackling of Mr. Heyward. At current, he is shackled at the feet. If you are within any of the first two rows of the gallery, if you will, directly behind Mr. Heyward, you can see that shackling. Until selection is completed, we would ask the court that Mr. Heyward's shackles be removed.

(R. p. 39, lines 8–22.) (emphasis added.) Petitioner's counsel established, on the record, that Petitioner's shackles could be seen by the jurors, as such, it is difficult to conceive of how the State could continue to argue that the shackles were not visible and that the burden-shifting articulated in *Deck* does not apply. 544 U.S. at 634, 125 S.Ct. at 2015.

Next, the State argues that the record fails to establish that “1) potential jurors actually saw the ankle shackles, 2) that any of the selected jurors for Petitioner's trial were seated in that precise area of the court house, 3) that the selected jurors in any way learned of Petitioner's shackles, and 4) that any juror was actually prejudiced as a result.” (Brief of Respondent, at 20.) Conveniently, the State fails to include any citation supporting this argument. That is because *Deck* does not require that the record establish any of the above-listed factors, and importantly, *Deck* does not require that the record establish that the shackles were visible only to those individuals who were ultimately selected to serve on the jury. In *Deck*, the Supreme Court of the United States found that the visible shackling of a criminal defendant was unconstitutional based on objections made by trial counsel on the record before jury *voir dire* began and during jury *voir dire*. 544 U.S. at 625, 125 S.Ct. at 2010. As such, the record is only required to demonstrate that the shackles were visible in the court room once the proceeding has begun, including during the jury selection process. *Id.* at 634, 2015. In Petitioner's case, the record does just that, as trial counsel objected to Petitioner's visible shackling during the jury selection phase of the proceeding, in striking similarity to the objections made in *Deck*. *Id.* at 625, 2010.

Further, *Deck* does not require that Petitioner demonstrate that any individual selected to serve on the jury “learned of Petitioner's shackles,” as the State argues. (Brief of Respondent at

20.) Rather, the record must establish, as the State inconsistently points out in its Brief, that jurors could see the shackles. (See Brief of Respondent, at 20 (citing *State v. Williams*, 485 A.2d 570 (Ct. 1985).) As further articulated by *Deck*, “where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation.” 544 U.S. at 635, 125 S.Ct. at 2015. As such, because Petitioner was forced to wear shackles, admittedly without adequate justification, which the record establishes were visible during jury selection, Petitioner “need not demonstrate actual prejudice to make out a due process violation” here. *Id.* The Court of Appeals’ decision with regard to the shackling issue is not consistent with United States Supreme Court precedent, and this Court should reverse the Court of Appeals.

III. Expert opinion testimony about the operational capabilities of the recovered firearm was superfluous and not relevant to the State’s case.

Petitioner was not charged with any crime for which the State needed to demonstrate that Petitioner used a functional firearm in order to prove Petitioner’s guilt. (R. p. 420, line 2–p. 421, line 6.) Despite this fact, at trial, the State offered Investigator David Collins as an expert in firearms and tool marks examination and identification and elicited testimony from him regarding whether a firearm recovered from Petitioner’s residence was operational. (R. p. 356, line 24–p. 365, line 11.) The Court of Appeals rightfully agreed with Petitioner’s argument that testimony regarding the operational capabilities of the recovered firearm were not relevant to the offenses with which Petitioner was charged, and the testimony was needlessly cumulative considering the other evidence introduced by the State, including the firearm itself. (R. p. 357, line 23–p. 359, line 7.); *Heyward*, 432 S.C. at 316–17, 852 S.E.2d at 462. In its Brief, the State also concedes that any such testimony was “superfluous.” (Brief of Respondent, at 24.)

Despite this concession, the State attempts to argue the superfluous evidence is not prejudicial. However, the State fails to apprehend that the admission of this testimony was particularly prejudicial to Petitioner because it allowed needlessly cumulative testimony, which the State used in an effort to paint Petitioner in a bad light and tie him to the crime scene. Further, the State grossly understates the impact of this testimony on this case. The State refers to the relationship between Investigator Collins' testimony and this case as a whole as "almost nonexistent." (Brief of Respondent, at 13.) This is a nonsensical statement given that during the State's closing argument, the State relied *solely* on Investigator Collins' testimony to connect the gun found at Petitioner's residence to the one described by Ms. Tollison's granddaughter, which unduly prejudiced the jury against Petitioner. (R. p. 419, lines 6-23.) Because this testimony should never have been admitted and caused Petitioner significant prejudice, this Court should reverse the Court of Appeals and grant Petitioner a new trial.

IV. The trial court's allowance of Petitioner's alias "Abdul Muslim" for use in the indictments and at trial offered no probative value and violated Petitioner's constitutional right to a fair trial.

Despite the State's argument to the contrary, the admission of Petitioner's alias "Abdul Muslim" was not necessary to connect the DNA from the crime scene to Petitioner. The State argues that it had to use the alias associated with the DNA maintained in the CODIS database to explain the connection to Petitioner's DNA in order to avoid confusion for members of the jury. (Brief of Respondent, at 29.) However, the State fails to explain why the national identification number assigned to both the "Abdul Muslim" alias and Petitioner was insufficient to explain this connection to the jury. Because the jury heard testimony regarding the matching identification number, the use of the alias was unnecessary and there was no probative value in using Petitioner's alias because the State could have simply used the national identification number instead. (R. p. 255, lines 10-13.)

The State also misapprehends Petitioner’s argument with regard to the State’s use of the full alias. The State claims that Petitioner argues that the State committed error by not mentioning the alias enough. (Brief of Respondent, at 28, n. 5.) This claim is unfounded and Petitioner has made no such argument. Rather, Petitioner argues that the State’s usage of the full alias “Abdul Muslim” offers no probative value as the State never elicited any testimony that Petitioner was known as “Abdul Muslim,” only that he was known to one witness as “Abdul.” (R. p. 321, line 23–p. 322, line 3.) Accordingly, the Court of Appeals erred in concluding that the use of Petitioner’s full alias “Abdul Muslim” was necessary, and the State could have used the first name of the alias only to the extent the use of the alias was needed at all (which Petitioner contends it was not).

Further, the State fails to apprehend the religious prejudice incited by repeatedly referring to Petitioner as “Abdul Muslim” and discounts trial counsel’s presentation of substantial uncontroverted evidence demonstrating the prejudice associated with the State’s use of Petitioner’s “Abdul Muslim” alias. (See R. p. 12, line 5–p. 14, line 15.) As the State notes in its Brief, Petitioner does not argue that the solicitor made improper comments about Petitioner’s religion, rather Petitioner argues that the references to Petitioner as “Abdul Muslim” impacted Petitioner’s right to a fair trial under the United States Constitution. In support of this assertion, Petitioner offers *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010), which found that referring to a Muslim defendant as a “domestic terrorist” served only to improperly evoke religious prejudice and inflame the passions and prejudice of the jury. Similarly, in Petitioner’s case, as there was no probative value offered by the alias “Abdul Muslim,” the use of the alias also was offered only to evoke religious prejudice. See also *U.S. v. Vue*, 13 F.3d 1206, 1213 (8th

Cir. 1994) (concluding that a constitutional error occurs when the government “invite[s] the jury to put [a defendant’s] racial and cultural background into the balance in determining their guilt”).

The State’s use of the alias to evoke religious prejudice is further highlighted by the State’s strategy of repeatedly eliciting irrelevant testimony regarding the victim’s Christian beliefs during trial, to contrast with Petitioner’s religious beliefs. As such, the Court of Appeals erred in finding that the use of “Abdul Muslim” alias did not invite undue prejudice against Petitioner. *Heyward*, 432 S.C. at 318, 852 S.E.2d at 463. Petitioner’s alias should have been struck from the indictment and from use at trial, given its lack of probative value and overwhelmingly prejudicial effect, and this Court should disregard the State’s arguments to the contrary and reverse the Court of Appeals and grant Petitioner a new trial because of this error.

V. Gruesome autopsy dissection photographs of the victim’s internal head injuries were not necessary to substantiate malice.

The State’s medical examiner, Dr. Durso, offered extensive testimony regarding the violent nature of the strangulation and severity of the injuries to Ms. Tollison, which was sufficient on the issue of malice and rendered the gruesome autopsy dissection photographs “superfluous.” *See State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring) (“The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense.”). The State argues that these photographs were properly admitted because “the pictures were the easiest . . . manner to communicate evidence [of malice] to the jury.” (Brief of Respondent, at 34.) However, given Dr. Durso’s extensive testimony with regard to Ms. Tollison’s injuries and this Court’s “growing concern” over the admission of gruesome autopsy photographs, *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010), the trial court should have appropriately balanced the probative

value of the photographs against their prejudicial effect instead of allowing the State to provide evidence of malice in the “easiest” way.

Furthermore, this Court has specifically held that color autopsy photographs of the victim, including photographs that depicted the victim’s scalp pulled away from her skull, should be excluded because “[t]he prejudice created by the photographs clearly outweighed any evidentiary value.” *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (citations omitted). As such, the Court of Appeals should have followed the precedent of this Court and reversed the trial court’s decision to admit the gruesome autopsy photographs because the prejudice caused by the admission of these gruesome autopsy photographs outweighed any evidentiary value.

Further, for their overwhelming prejudicial impact, the photographs offer relatively little evidentiary value, despite the State’s argument that the photographs corroborate Dr. Durso’s testimony. What the State fails to address is that the photographs were not necessary to establish malice, given Dr. Durso’s testimony regarding the extent and nature of Ms. Tollison’s injuries, and as such, should never have been admitted, as “[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant *or* not necessary to substantiate material facts or conditions.” *Torres*, 390 S.C. at 623, 703 S.E.2d at 228 (emphasis added). As such, this Court should reverse the Court of Appeals and grant Petitioner a new trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court reverse the decision of the Court of Appeals and Petitioner’s convictions.

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Respectfully submitted,

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