The Supreme Court of South Carolina

The State, Respondent,

v.

James Heyward, Petitioner.

Appellate Case No. 2021-000122

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Dec 29 2022

S.C. SUPREME COURT

FINAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

Petitioner James Heyward ("Mr. Heyward" or "Petitioner") is currently serving a sentence of life in prison without the possibility of parole plus seventy years following his convictions for murder, burglary in the first degree, armed robbery, two counts of kidnapping, assault and battery in the first degree, pointing and presenting a firearm, and possession by a

person of an unlawful weapon having been convicted of a crime of violence. The Richland County Grand Jury indicted Petitioner on these charges.

Prior to the commencement of trial, the Honorable R. Knox McMahon conducted evidentiary hearings on a number of issues. The case was called for trial on June 27, 2017, before Judge McMahon. On July 3, 2017, the jury returned a verdict of guilty as to all charges. (R. p. 420, line 2-p. 421, line 6.) The trial court sentenced Petitioner to life in prison without the possibility of parole, plus seventy years to be served consecutively and ten years to be served concurrently. (R. p. 422, line 3-p. 423, line 14.)

Petitioner timely filed his notice of appeal on July 11, 2017, and raised the controlling issues to the Court of Appeals, which the Court of Appeals decided on October 14, 2020. *State v. Heyward*, 432 S.C. 296, 852 S.E.2d 452 (Ct. App. 2020). The Court of Appeals found that the trial court did not err in admitting a fingerprint card obtained from a New Jersey database and related testimony in direct violation of this Court's decision in *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009). The Court of Appeals found that the trial court did err in denying Petitioner's request to remove his shackles during the jury selection phase but ruled such error was harmless, which violates and conflicts with United States Supreme Court precedent. *See Holbrook v. Flynn,* 475 U.S. 560, 568–69, 106 S.Ct. 1340, 1345–46 (1986). The Court of Appeals found that the trial court also erred in allowing the expert testimony regarding the operational capabilities of the recovered handgun but wrongly found the trial court's error harmless. The Court of Appeals also held that the trial court did not err in allowing the use of Petitioner's alias "Abdul Muslim" in the indictments and in trial or in admitting gruesome autopsy dissection photographs of the victim.

Petitioner raised these errors in his motion for rehearing before the Court of Appeals. (App. Vol. III, at p. 658.) After the Court of Appeals denied rehearing, Petitioner petitioned this Court for a writ of certiorari, which was granted on November 23, 2022.

STATEMENT OF THE FACTS

On October 11, 2015, Alice Tollison was found strangled to death in her home. (R. p. 147, line 18-p. 148, line 2.) Her eight-year old great-granddaughter, G.F., was also found at the scene, after being tied up and left by the assailant. (R. p. 147, line 18-p. 148, line 2, p. 150, lines 6-18, p. 154, lines 15-21, p. 159, lines 22-24.)

On October 12, 2015, the Richland County Police matched certain fingerprints from the crime scene to a fingerprint card which was attributed to Petitioner from the State of New Jersey's Automated Fingerprint Identification System ("AFIS") database. (R. p. 371, lines 6-19, p. 204, lines 11-19, p. 208, lines 1-10.) After his arrest, the police fingerprinted Petitioner through Livescan software. (R. p. 225, lines 8-17.) At trial, the State presented testimony from latent print analysis expert Investigator Trisha Odom, who conducted fingerprint analyses comparing the latent prints collected from the crime scene and the New Jersey fingerprint card. R. p. 197, line 25- p. 196, line 5, p. 202, lines 10-21, p. 224 lines, 1-14.) Defense counsel objected to the introduction of all fingerprint evidence because the fingerprint card from the New Jersey database was never authenticated in accordance with South Carolina law. (R. p. 203, line 18-p. 205, line 2.) During an in camera session, Investigator Odom admitted that she did not know the minimum compliance thresholds for every state in order to place prints into their respective databases. (R. p. 220, line 21-p. 221, line 22.) Nevertheless, the court overruled defense counsel's argument that the New Jersey prints had not been authenticated and ultimately admitted the fingerprint evidence. (R. p. 243, lines 12-17.)

A search warrant was obtained following Petitioner's arrest, and a gun was found in the home where Petitioner was residing. (R. p. 314, lines 11-13, p. 314, line 25-p. 316, line 5.) At trial, G.F. testified that the assailant had a pistol that was "gold and rusty." (R. p. 146, line 24-p. 147, line 14.) The State elicited detailed testimony about the recovered gun as well. Investigator Michael Beeler testified that the recovered gun was an unloaded ".32 caliber Smith & Wesson handgun." (R. p. 351, line 24-p. 352, line 3.) During his testimony, the court admitted "the handgun . . . as well as six unfired cartridges" into evidence. (R. p. 352, lines 19-25.)

After the entry of the recovered gun into evidence and the testimony describing the gun, defense counsel objected to the subsequent testimony of Investigator David Collins, who was offered by the State to opine on the operational capabilities of the recovered firearm. (R. p. 357, line 23- p. 358, line 5.) The court overruled the objection, finding that whether the firearm was "capable of expelling a projectile through explosion. . . . is an essential element of pointing and presenting." (R. p. 360, lines 16-22.) The court further stated that such testimony would also be relevant to finding whether Petitioner was armed with a deadly weapon during the robbery. (R. p. 359, line 21-p. 360, line 4.) In addition to testifying about the operational capabilities of the recovered firearm, Investigator Collins testified it was "somewhat worn and the finish [was] in bad condition." (R. p. 357, lines 9-11.)

Defense counsel also objected to the use of the alias "Abdul Muslin" in the indictments and at trial. (R. p. 426, line 2-p. 437, line 14, p. 441, line 11-p. 443, line 19, p. 444, lines 4-10, p. 446, lines 7-20, p. 447, lines 8-16, p. 3, lines 5-10, Motion to Strike, Ex. 1.) The alias was read to the jury pool as part of the indictments and referenced during jury voir dire. (R. p. 4, line 19-p. 16, line 7.) During the trial, the State presented testimony that DNA from the crime scene matched to an "Abdul Muslim" with the national identification number 220688PA. (R. p. 378,

line 2-p. 379, line 9.) Previous testimony indicated that Petitioner's national identification number was 220688PA, and another State witness testified she knew Petitioner as "Abdul." (R. p. 225, lines 10-13, p. 321, line 23-p. 322, line 3.)

Petitioner was shackled in the courtroom, and prior to jury selection, defense counsel requested that Petitioner's shackles be removed to prevent any prejudice from the jury. (R. p. 2, lines 8-22.) Defense counsel noted that Petitioner had been well-behaved on his three prior court appearances in relation to the case, and he noted that any potential jurors in the first two rows of the gallery would certainly see Petitioner's shackling. (*Id*.) The court denied this request without any explanation. (R. p. 2, line 23.)

At trial, the State introduced two color photographs taken during Ms. Tollison's autopsy that depicted the front and back of her dissected scalp pulled away from her skull to reveal bruising underneath. (R. p. 292, lines 4-10, p. 294, line 22-p. 295, line 11, State Exs. 14 and 15.) Defense counsel objected to the introduction of these photographs under Rule 403, SCRE, because Ms. Tollison's cause of death was strangulation, and the photographs therefore lacked any probative value. (R. p. 292, line 13-p. 293, line 10, p. 295, line 20-p. 296, line 9.) In addition, they risked undue prejudice based on the gruesome nature of the photographs. (*Id*.) Dr. Amy Durso, who performed Ms. Tollison's autopsy and took the photographs, testified as to the bruising of Ms. Tollison's head depicted in the photographs, although she testified that Ms. Tollison's cause of death was strangulation and admitted she could not date the bruising of the head. (R. p. 303, line 20-p. 304, line 1, p. 312, line 25-p. 313, line 2.) Moreover, Dr. Durso provided extensive testimony regarding the violent nature of the strangulation and the severity of the injuries to Ms. Tollison resulting from the strangulation. (R. p. 283, line 10-p. 290, line 8, p. 305, line 11-p. 310, line 20.)

STANDARD OF REVIEW

"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. Sheppard*, 391 S.C. 415, 420, 706 S.E.2d 16, 18 (2011) (citation omitted); *see also State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.") (citations omitted); *State v. Torres*, 390 S.C. 618, 622-23, 703 S.E.2d 226, 228 (2010) ("The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion.") (quoting *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003)) (internal quotation marks omitted); and *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995) ("Whether a defendant is restrained during trial is within the trial judge's discretion.").

"An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citation omitted). Moreover, "[a] failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (internal quotation marks omitted) (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)).

The appellate standard of review for questions of law is de novo. *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court.") (citation omitted).

ARGUMENT

I. The Court of Appeals erred and departed from well-established precedent of this Court in affirming the trial court's admission of a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey Fingerprint card.

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. The Court of Appeals erroneously concluded that the trial court properly admitted the New Jersey fingerprint card under Rule 901(b)(3), SCRE. *Heyward*, 432 S.C. at 314, 852 S.E. 2d at 461. In order to reach this conclusion, the Court of Appeals overlooked the requirements for fingerprint authentication, as set forth by this Court in *Anderson*, 386 S.C. at 120, 687 S.E.2d at 35, in favor of a novel authentication method for fingerprints that is inconsistent with established South Carolina law.

Specifically, the Court of Appeals concluded that the State's fingerprint expert's comparison of Petitioner's known fingerprints—the prints taken when he was arrested and fingerprinted by Richland County in connection with this case—with the prints on the fingerprint card the investigators obtained through the AFIS system from New Jersey was sufficient to authenticate the New Jersey fingerprints obtained through AFIS pursuant to Rule 901(b)(3), SCRE. *Heyward,* 432 S.C. at 315, 852 S.E. 2d at 461. No other South Carolina case cites Rule 901(b)(3) for the authentication of fingerprints. Rather, South Carolina's seminal case on fingerprint authentication is *Anderson*, 386 S.C. at 120, 687 S.E.2d at 35, which cites to Rule 901(a), SCRE, instead.

It is well established under South Carolina law that fingerprint evidence must be authenticated in order to be admissible at trial. *See, e.g., State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987) (reversing conviction based on trial court's failure to authenticate fingerprint comparison prior to its admission); Rule 901(a), SCRE ("The requirement of authentication or

identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). Under well-established South Carolina law, "evidence as to when and by whom the [fingerprint] card was made and that the prints on the card were in fact those of this defendant" is required to authenticate fingerprints. *Rich*, 293 S.C. at 174, 359 S.E.2d at 282 (citation omitted). In *Anderson*, this Court also required testimony regarding how one's fingerprints were taken, including testimony that a known fingerprint card was taken at a correctional facility on a certain date, in order to meet the authentication requirement of Rule 901, SCRE. 386 S.C. at 128–29, 131–32, 687 S.E.2d at 39–40, 41. Critically, the fingerprint expert in *Anderson* testified that the prints on the AFIS card were taken at a correctional facility, on a specific date, and assigned a unique state identifying number. *Id.* at 128, 687 S.E.2d at 39–40. As the Court of Appeals recognized, there was no such testimony at Petitioner's trial. *Heyward,* 432 S.C. at 314, 852 S.E. 2d at 461. ("[W]e agree the State failed to establish when and where the N.J. Fingerprints were taken . . ."). Accordingly, the Court of Appeals overlooked the State's admitted failure to meet the requirements of *Anderson* when finding that the New Jersey fingerprint card was nevertheless authenticated.

The State has previously argued that this Court "explicitly acknowledged" in *Anderson* that expert testimony can be used to authenticate fingerprint cards, and, therefore, Investigator Odom's testimony was sufficient to authenticate the New Jersey fingerprint cards. (App. Vol. III, at p. 677.) However, the State's characterization of this Court's decision in *Anderson* is overly broad and incorrect. This Court's holding in *Anderson* does not propose that any "expert" can authenticate fingerprint cards, even if the expert is lacking certain foundational knowledge about the fingerprints, including when, where and how the fingerprints were collected. In fact,

this Court articulated quite the opposite—in *Anderson*, this Court only found the burden of authentication satisfied where the fingerprint expert provided "testimony which substantiated the process used in obtaining and maintaining the fingerprint card." 386 at 128, 687 S.E.2d at 39. No such testimony exists in Petitioner's case, and, as such, the investigator's authentication of the New Jersey fingerprint card was impermissible under South Carolina law.

Even if reliance on Rule 901(b)(3) is a permissible method for authenticating fingerprints under South Carolina law (which Petitioner contends it is not), the State's fingerprint expert would have needed to use the scientifically accepted and peer reviewed ACE-V methodology to reliably authenticate the New Jersey fingerprints. As the Court of Appeals recognized, in Petitioner's case, the State's fingerprint expert's comparison between the Richland County prints and the New Jersey prints obtained through AFIS was limited to a pattern comparison and was not a minutia comparison. *Heyward,* 432 S.C. at 315, 852 S.E. 2d at 461–62. However, the Court of Appeals failed to appreciate the importance of the distinction between the two types of comparisons—notably, that the ACE-V minutia comparison methodology is a scientifically accepted and peer reviewed methodology of comparing fingerprints. (*See* R. p. 260, lines 1–17.) The State's fingerprint expert's admitted use of a simple pattern comparison is insufficient to authenticate the fingerprint evidence.

Finally, the admission of the improperly authenticated New Jersey fingerprints was not harmless error. Investigator Odom did not delineate between the Richland County prints and the New Jersey prints in her report on the fingerprint evidence. Accordingly, her use of the improperly authenticated New Jersey fingerprints in that report would mean that the entire report was inadmissible and the critical fingerprint evidence would not have been presented to the jury. The Court of Appeals erred in holding that the trial court properly admitted the New Jersey

fingerprint card and that the fingerprint card was properly authenticated, and this error was not harmless.

The Court of Appeals' decision is not consistent with longstanding South Carolina case law and precedent of this Court, and for these reasons, this Court should reverse the Court of Appeals and grant Petitioner a new trial.

II. The Court of Appeals erred in finding the trial court's erroneous denial of Petitioner's request to remove his shackles during jury selection was harmless.

The Court of Appeals erred in finding that the trial court's erroneous denial of Petitioner's request to remove his shackles during jury selection was harmless because Petitioner was not prejudiced. *Heyward*, 432 S.C. at 323, 852 S.E.2d 452 at 466. The Court of Appeals' conclusion that the trial court's denial of Petitioner's request to remove his shackles was harmless is in direct opposition to binding precedent of the United States Supreme Court finding shackling to be "inherently prejudicial." *Holbrook,* 475 U.S. at 568–69, 106 S.Ct. at 1345–46.

The Court of Appeals did appropriately conclude that the trial court abused its discretion in refusing to allow Petitioner to appear in court without shackles. *Heyward*, 432 S.C. at 323, 852 S.E.2d at 466. The Court of Appeals found that the trial court failed to properly exercise its discretion and there was no evidence of a security concern that would outweigh the prejudice to Mr. Heyward of appearing before potential jurors in shackles. *Id.* at 324, 466.

However, in a paradoxical conclusion, the Court of Appeals determined this erroneous denial of Petitioner's request to have his shackles removed was harmless because Petitioner "was not prejudiced." *Id.* at 325, 467. In reaching this conclusion, the Court of Appeals misapprehended the United States Supreme Court decisions of *Holbrook*, 475 U.S. at 560, 106 S.Ct. at 1340, and *Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007 (2005).

The Court of Appeals specifically stated in its opinion that in *Deck*, 544 U.S. at 622, 125 S.Ct. at 2007, the State of Missouri's "argument failed to take into account the Supreme Court's statement in *Holbrook v. Flynn* that shackling is 'inherently prejudicial.'" *Heyward*, 432 S.C. at 324, 852 S.E.2d 452 at 466. (citations omitted). Yet, in Petitioner's case, the Court of Appeals also failed to consider this statement by the United States Supreme Court and failed to properly conclude that the trial court's admitted abuse of discretion in refusing to grant Petitioner's request to remove his shackles was prejudicial.

The Court of Appeals also mistakenly refused to apply the burden-shifting required by *Deck*, 544 U.S. at 622, 125 S.Ct. at 2007, because, as the Court of Appeals incorrectly concluded, "it is not obvious from the record that the shackles were observed." *Heyward*, 432 S.C. at 325, 852 S.E.2d 452 at 467. However, it <u>*is*</u> obvious from the record in this case that the shackles were observed, and the Court of Appeals noted that Petitioner objected to being shackled at his feet because potential jurors in the first two rows of the gallery could see the shackles. *Id.* at 327, 468. Importantly, in *Deck*, the record upon which the United States Supreme Court relied for establishing that the shackles were visible consisted entirely of the objections made by Deck's attorney for removal of the shackles. *Deck*, 544 U.S. at 634, 125 S.Ct. at 2015. Specifically, Deck's attorney objected "because of the fact that Mr. Deck is shackled in front of the jury . . . ." *Id.* (finding that the record "makes clear that the jury was aware of the shackles" and specifically citing to Deck's attorney's objection on the record "that 'Mr. Deck was shackled *in front of the jury*'") (emphasis added by court). Likewise, here, Petitioner's attorney's objections were sufficient to establish that Petitioner's leg shackles were visible. 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) The visibility of Petitioner's shackles was the very basis for the objection. Accordingly, the Court of Appeals overlooked that the record here establishes just what the record in *Deck* established—that Petitioner's shackles worn during jury selection were visible.

The Court of Appeals also refused to apply the burden-shifting required by *Deck* on the basis that although Petitioner argued that potential jurors in the first two rows of the gallery could see the shackles, the record does not establish that any of the jurors who were actually selected for Petitioner's trial could or did see the shackles. *Heyward*, 432 S.C. at 327, 852 S.E.2d 452 at 468. However, again, the Court of Appeals overlooked that the objections to the shackles worn in *Deck* were, just as the objections here, made during the jury selection phase of the proceeding. 544 U.S. at 625, 125 S.Ct. at 2010. Accordingly, there was no proper basis upon which the Court of Appeals could rely to refuse to apply the burden-shifting required by *Deck*. 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. *Deck*, 544 U.S. at 635, 125 S.Ct. at 2015 (citing *Holbrook*, 475 U.S. at 568, 106 S.Ct. at 1340).

The Court of Appeals attempted to skirt the burden-shifting requirements of *Deck* by relying on its decision in *State v. Johnson,* 422 S.C. 439, 812 S.E.2d 739 (Ct. App. 2018). The Court of Appeals' reliance on *State v. Johnson* to conclude that the heightened standard in *Deck* does not apply to Petitioner's case is misguided. *Heyward*, 432 S.C. at 326–27, 852 S.E.2d at 467–68. In *State v. Johnson*, the defendant was being brought from the police car parked outside into the courthouse in handcuffs, and the record failed to demonstrate whether any juror

happened to see this procession. 422 S.C. at 458, 812 S.E.2d at 749. This is a completely different scenario from Petitioner's situation where the record clearly establishes that he was shackled while inside the courtroom directly in front of rows of potential jurors, from which twelve individuals would be selected to determine his guilt or innocence. In fact, the *Johnson* court cites to *State v. Moore* for the following proposition: "We think that when a jury or members thereof see an accused *outside the courtroom* in chains or handcuffs the situation is psychologically different and less likely to create prejudice in the minds of the jury." *Id.* at 458, 812 S.E.2d at 749 (quoting *State v. Moore*, 257 S.C. 147, 152–32, 184 S.E.2d 546, 549 (1971)) (emphasis added). The Court of Appeals overlooked this significant distinction from the *Johnson* case and should not have relied thereon.

The Court of Appeals' decision is not consistent with United States Supreme Court precedent and erroneously relies on decisions from this Court that are factually inapplicable, and for these reasons, this Court should reverse the Court of Appeals.

III. The Court of Appeals erred in finding the trial's court's erroneous allowance of expert opinion testimony about the operational capabilities of the recovered firearm was harmless.

The Court of Appeals erroneously concluded that the trial court's error in allowing expert opinion testimony regarding the operational capabilities of the firearm recovered from Petitioner's home was harmless. *Heyward*, 432 S.C. at 316, 852 S.E.2d at 462. The trial court's improper allowance of this testimony was not harmless because such testimony was irrelevant, needlessly cumulative, and unduly prejudicial to Petitioner.

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 the firearm recovered from Petitioner's residence was operational. (R. p. 356, line 24-p. 365, line 11.) Defense counsel objected to Investigator Collins' testimony because 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.) The trial court overruled the objection. (R. p. 359, line 18-p. 361, line 4.) Although the trial court acknowledged previous testimony already established that it was, in fact, a firearm, the trial court ruled that the operational capability of the firearm was relevant to the charges of armed robbery and pointing and presenting. (*Id.*)

The Court of Appeals rightfully agreed with Petitioner's argument and held that the trial court abused its discretion in allowing expert testimony about the operational capabilities of the firearm because the evidence was not relevant to Petitioner's charges. *Heyward*, 432 S.C. at 316–17, 852 S.E.2d at 462. Despite this finding, the Court of Appeals concluded that this erroneous admission of expert testimony was harmless because it did not prejudice Petitioner. *Id.* at 318, 463.

The Court of Appeals' conclusion is misguided. In fact, 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. As the trial court acknowledged, there was prior testimony that a gun was recovered from Appellant's residence. (R. p. 360, lines 16-18.) Specifically, Chief Stan Smith testified that investigators found a gun in Appellant's residence. (R. p. 314, lines 19-24.) Shortly after, Investigator Michael Beeler provided detailed testimony about the recovered gun, including that it was an unloaded ".32 caliber Smith & Wesson handgun." (R. p. 351, line 24-p. 352, line 3.) During his testimony, the court admitted "the handgun . . . as well as six unfired cartridges" into evidence. (R. p. 352, lines 19-25.) With this testimony and the admission of the gun itself into

evidence, there was no need for any additional testimony from Investigator Collins regarding the firearm and its operational capabilities.

The wrongful admission of Investigator Collins' testimony about the operational capabilities of the firearm allowed the State to hammer, yet again, on the fact that a gun was found in Petitioner's residence, unduly prejudicing the jury against him. In fact, 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 G.F. (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 Court of Appeals erred in affirming the trial court's allowance of Petitioner's alias "Abdul Muslim" for use in the indictments and at trial, which violated Petitioner's constitutional right to a fair trial.

The Court of Appeals also erred in concluding that Petitioner's alias "Abdul Muslim" was necessary to connect the DNA from the crime scene to Petitioner because the DNA matched to "Abdul Muslim" in a national database. *Heyward*, 432 S.C. at 319–20, 852 S.E.2d at 464. In doing so, the Court of Appeals failed to address that this DNA match also included the national identification number 220688PA (R. p. 378, line 2–p. 379, line 9), which was the national identification number assigned to Petitioner. Because the jury heard testimony regarding the matching identification number, the use of the alias was unnecessary. (R. p. 255, lines 10–13.) Thus, there was no probative value in using Petitioner's alias in connection with this DNA match because the State could have simply used the national identification number instead. Moreover, the State never elicited any testimony that Petitioner was known as "Abdul Muslim," only that he was known to one witness as "Abdul," indicating that there was no probative value in the "Muslim" reference at all. (R. p. 321, line 23–p. 322, line 3.) Accordingly, the Court of Appeals erred in concluding that the use of Petitioner's alias "Abdul Muslim" was necessary.

Not only did the reference to "Muslim" offer no probative value, it also invited undue prejudice from the jury and should have been excluded under Rule 403, SCRE. Trial counsel presented substantial uncontroverted evidence at the pre-trial hearing on Petitioner's motion to strike 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.) Furthermore, referring to Petitioner by the alias "Abdul Muslim" impacted Petitioner's right to a fair trial under the United States Constitution. *See Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010) (finding that a Muslim defendant's due process rights had been violated where the solicitor referred to him as a domestic terrorist and referenced the terror attacks of September 11th where the defendant was not on trial for terrorism and the statements served only to improperly evoke religious prejudice and inflame the passions and prejudice of the jury); *United States v. Ham*, 998 F.2d 1247, 1252-53 (4th Cir. 1993) ("[W]e are especially sensitive to prejudice in a trial where defendants are members of an unpopular religion."); *see also United States 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"). As stated by Judge Davis of the Fourth Circuit Court of Appeals, "appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial." *United States v. Garcia-Lagunas*, 835 F.3d 479, 501 (4th Cir. 2016) (Davis, J., dissenting) (citation omitted).

Of particular importance in this case, the State capitalized on the alias and contrasted the Islamic connotation of the alias with repeated testimony regarding the victim's Christian beliefs during trial. For example, G.F. testified that she and Ms. Tollison would go to church together every other Sunday. (R. p. 139, lines 13-23.) Another of the State's witness testified she knew

Ms. Tollison from church and that they would go to church together every Sunday. (R. p. 193, line 17-p. 194, line 11, p. 195, line 8-p. 196, line 7.) Moreover, another witness mentioned that Ms. Tollison hosted a Bible study. (R. p. 355, line 23.) The use of the "Abdul Muslim" alias here, particularly in light of the repeated references to Ms. Tollison's Christian beliefs, was unduly prejudicial. 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.

In doing so, the Court of Appeals also made two incorrect assertions about the allowance of the alias. First, the Court of Appeals stated that the State's use of Petitioner's alias would not have been error because Petitioner did not renew his motion to strike the alias at trial. *Heyward*, 432 S.C. at 320, n. 9, 852 S.E.2d at 464, n.9. However, this is not accurate. Petitioner's trial counsel did renew the motion to strike at the beginning of trial. (R. p. 45, lines 5–8). Secondly, the Court of Appeals characterized Petitioner's counsel as having conceded this issue by acknowledging that prejudice from the alias could be "addressed" by voir dire. *Heyward*, 432 S.C. at 320, n. 10, 852 S.E.2d at 464, n. 10. However, trial counsel's statement about voir dire was not a concession of the issue in any way; it was merely an acknowledgement that voir dire could address—but not entirely solve—the issue after having preserved the issue on the record. 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 reverse the Court of Appeals and grant Petitioner a new trial because of this error.

V. The Court of Appeals failed to consider this Court's concern over admitting gruesome autopsy photographs and erred in affirming the trial court's admission of gruesome autopsy dissection photographs of the victim's internal head injuries.

Finally, the Court of Appeals erred in affirming the trial court's admission of gruesome autopsy dissection photographs of the victim's internal head injuries. At trial, the State

introduced two color photographs taken during Ms. Tollison's autopsy that depicted her dissected scalp, pulled away from her skull to reveal bruising underneath. (R. p. 292, lines 4-10, p. 294, line 22-p. 295, line 11, State Exs. 14 and 15.) Defense counsel objected to the introduction of these photographs under Rule 403, SCRE, because Ms. Tollison's cause of death was strangulation, and as such, the photographs lacked any probative value. (R. p. 292, line 13-p. 293, line 10, p. 295, line 20-p. 296, line 9.) The Court of Appeals erred in finding that the photographs were not unduly prejudicial, despite this Court's precedent holding as much. *Heyward*, 432 S.C. at 320–21, 852 S.E.2d at 464. This Court has expressed a "growing concern" over the admission of gruesome autopsy photographs. *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). 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.

Furthermore, for their overwhelming prejudicial impact, the photographs offer relatively little evidentiary value; as such, the Court of Appeals erred in affirming the trial court's admission of gruesome autopsy photographs on the basis that the photographs were probative of the issue of malice. *Heyward*, 432 S.C. at 322, 852 S.E.2d at 465. "Photographs 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). Even assuming these gruesome autopsy photographs were probative of the issue of malice, the photographs were not necessary to substantiate malice here. 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, rendering the 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 Court of Appeals also erred in affirming the trial court's determination that the autopsy photographs corroborated Dr. Durso's testimony. *Heyward*, 432 S.C. at 322–23, 852 S.E.2d at 465. Again, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not necessary to substantiate material facts or conditions." *Torres*, 390 S.C. at 623, 703 S.E.2d at 228. The extent and nature of the victim's injuries were sufficiently explained by Dr. Durso's testimony, and the Court of Appeals erred in affirming the trial's court erroneous decision to admit the photographs. 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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