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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAY L. KELLY,

APPELLANT

APPELLATE CASE NO. 2022-001449

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred in forcing Appellant, who was on trial for murdering a police officer, to appear before the jury in a restraint chair, where the restraint chair was not justified by the circumstances, since restraints must be case specific?

2.

Whether the trial court erred in requiring Appellant to remain shackled throughout his trial for murdering a police officer, where shackling was not justified by the circumstances, since shackling must be case specific?

3.

Whether the trial court erred in Appellant's trial for murdering a police officer, where it failed to exercise any discretion regarding the large number of uniformed officers in the gallery (35 – 40 officers in uniform including tactical gear), since Appellant had the right to a fair trial free from outside influence?

4.

Whether the trial court erred in admitting repeated depictions (video, audio, and photographic) of the fatal crash and its aftermath, where the probative value of the cumulative evidence was substantially outweighed by the danger of unfair prejudice, since the evidence should have been excluded pursuant to Rule 403, SCRE?

5.

Whether the trial court erred in admitting evidence pertaining to a blood draw purportedly of Appellant's blood, which was taken for medical purposes and demanded by law enforcement for prosecution purposes, where the chain of custody was wholly inadequate, since the State must establish a chain of custody as far as practicable?

STATEMENT OF THE CASE

During the November term of 2020, a Greenville County Grand Jury indicted Appellant for murder, two counts of resisting arrest with assault, driving without a license, and providing false information to police. During the September term of 2021, a Greenville County Grand Jury indicted Appellant for trafficking cocaine base, 28 – 100 grams, and possession of a weapon during the commission of a violent crime. During the November term of 2022, a Greenville County Grand Jury indicted Appellant for a third count of resisting arrest with assault. Appellant was also charged with speeding and following too closely.[1]

Appellant was tried before the Honorable Edward W. Miller and a jury, from September 26 – 29, 2022. W. Walter Wilkins, III, and Grace Moroney prosecuted the case. Appellant appeared pro se with Mindy Lipinski as standby counsel during initial portions of the trial. Standby counsel subsequently stepped in to represent Appellant as his counsel.[2]

Appellant was acquitted of speeding and following too closely. Appellant was convicted as indicted on the remaining offenses, and he was sentenced to serve: life without parole for murder; thirty years for trafficking cocaine base, 28 – 100 grams, third offense; five years for possession of a weapon during the commission of a violent crime; ten years for each count of resisting arrest with assault; time served for driving without a license; and time served for giving false information to police.[3]

This appeal follows.

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1 R. 701-714; R. 100, l. 21 – 101, l. 10.

2 R. 61; R. 166, l. 17 – 171, l. 20; R. 73, ll. 4-24.

3 R. 685, l. 20 – 687, l. 7; R. 697, ll. 15-23; R. 715-721.

ARGUMENT

Introduction

Appellant stood trial for causing the death of a police officer who was killed in the line of duty after being hit by a tractor trailer. Although Appellant did not commit misconduct in court or threaten misconduct in court, he refused to come out of his holding cell and was strapped into a restraint chair. Appellant was thus tried before the jury in a restraint chair and while shackled. Thirty-five to forty police officers in uniform (some in tactical gear) observed the trial from the gallery. The State repeatedly admitted depictions of Decedent getting hit by the eighteen-wheeler and dying in the road. Appellant did not receive due process and a fair trial under these circumstances: conviction in a court of law is not by passion, prejudice, or show of force.

Relevant facts

On the afternoon of October 20, 2020, Master Deputy Conley Jumper (Decedent) of the Greenville County Sherriff's Department was killed while trying to arrest Appellant. Appellant was pulled over for speeding and following too closely by interdiction units looking for crime on I-85. During the stop, Deputy Wasserman smelled marijuana and decided to search Appellant's car. When Wasserman told Appellant of his intention to search, Appellant tried to run and get back in his car. A struggle ensued which included Appellant, Wasserman, Decedent, and a third officer, Deputy Ledbetter.[4]

The car was parked close to the white line which demarcated the shoulder from the busy road. Interstate traffic passed by the struggling men. Appellant succeeded in getting back in the car and Decedent entered the car after him, with both men crammed in the driver's compartment; Decedent face down on top of Appellant's lap with Decedent's legs hanging out of the open

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[4] R. 140, l. 3 – 102, l. 12; R. 237, l. 6 – 248, l. 23; State's Exhibit #2.

driver's door. The car entered traffic while Decedent and Appellant struggled over the steering wheel. The car and Decedent's lower body were struck by an eighteen-wheeler. Decedent was ejected from the car and rolled to a stop; Appellant's car was struck by a fourth interdiction unit, driven by Deputy Harrison, and Appellant was ejected from the car. Although emergency medical personnel arrived quickly, Decedent died within twenty minutes from blunt force injuries.[5]

Appellant did not want to be represented by a lawyer, and after warnings pursuant to *Faretta v. California*, 422 U.S. 806 (1975), trial began with Appellant representing himself. Standby counsel was present. The arguments Appellant made in his defense were misguided. Appellant repeatedly questioned the court's jurisdiction; he questioned the trial judge's oath and the solicitor's birth certificate. He stated he was a "beneficiary of the trust." He made general objections to the proceedings: "I object to the proceedings. I do not understand the jurisdiction." However, Appellant did not commit any misconduct in the courtroom—he did not threaten anyone with physical harm, he did not physically act out in any manner, and he did not otherwise present a security threat. He did not use profanity.[6]

The trial proceeded through voir dire, jury selection, swearing of the jury, and the court's introductory remarks. The proceedings broke for lunch, and when they resumed, the court observed that Appellant was now in "a special chair." Appellant stated, "Let the record reflect that I'm not here willingly. I'm handcuffed, shackled. I'm tied to a chair. I was insulted. And I

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5 R. 150, ll. 4-15; R. 161, l. 19 – 166, l. 6; R. 247, l. 14 – 259, l. 19; R. 280, l. 2 – 289, l. 6; R. 305, ll. 7-20; R. 284, l. 8 – 344, l. 3; R. 347, l. 3 – 447, l. 8; State's Exhibit #2.

6 R. 46, l. 20 – 23, l. 9; R. 71, ll. 4-14; R. 83, ll. 8-11; R. 92, l. 16 – 97, l. 14; R. 112, l. 24 – 123, l. 16.

do not choose to participate in any of the proceedings. . .” The court asked why Appellant was in the restraint chair.[7]

> THE SLED OFFICER: Your Honor, it was when—he refused to come out of his cell. And then when we went to assist him in standing, it was active resistance towards us at that point in time. So he was placed in the chair and brought to the courtroom.
>
> THE COURT: Okay.
>
> DEFENDANT KELLY: I object. That’s a lie. I was physically assaulted.
>
> THE COURT: Okay.
>
> DEFENDANT KELLY: It’s on camera.
>
> THE COURT: All right. Well, let me—Mr. Kelly, we’re just doing our best to accommodate you.
>
> DEFENANT KELLY: I don’t want any accommodations.
>
> THE COURT: Okay.
>
> DEFENDANT KELLY: I don’t want any participation in this circus.
>
> THE COURT: All right, Well, this is your day in court, so to speak. All right. Well, let’s—let’s bring the jury in. Hold them one second, the jury I’m talking about. Just for the record, **I want to make a finding that the Defendant has been disruptive. And that because of that behavior, pursuant to the guidelines, as I understood them from the United States Supreme Court laid out in *Illinois v. Allen*, I approve the use of this restraint chair**.[8]

The Solicitor made two body-worn camera recordings of what happened in Appellant’s holding cell a part of the record. These recordings are Court’s Exhibit #9 and Court’s Exhibit #10, and are on file with this Court. The recordings show that after Appellant refused to come out of the holding cell, approximately nine officers approached and entered the cell with a restraint chair, attempted to place Appellant in the restraint chair, and Appellant did not

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[7] R. 131, l. 13 – 134, l. 10.

[8] R. 134, l. 11 – 135, l. 12 (emphasis added).

cooperate. Instead, he squirmed, struggled, and jerked his shackled hands around. Appellant was placed into the chair and wheeled into the courtroom while strapped into the chair and shackled. Court's Exhibit #4 and Court's Exhibit #5 are photographs of Appellant in the courtroom in the restraint chair that were published by the media. These photographs are also on file with this Court.[9]

The trial proceeded through the prosecution's opening statement. Appellant did not give an opening statement. When the State finished its direct examination of its first witness, Appellant asked to speak with standby counsel. There was a break in proceedings and Appellant agreed to be represented by standby counsel. He also told standby counsel he would walk into the courtroom. Thereafter, the court noted Appellant was no longer in the restraint chair, but he remained shackled except for his writing hand. The court broke for the evening.[10]

The next day, defense counsel made a motion to remove Appellant's shackles. Defense counsel argued the shackles should be removed since they were audible, and that although they were not visible, "you can nonetheless hear the metal, the belly chain that he's in, the handcuffs that he's in, the leg restraints that he's in. And so the Defense is making a motion to remove those so as to mitigate it." The court ruled, "I go back to the seminal case of *Illinois vs. Allen* about he could be gagged and it would be appropriate if he earned that. So he is where he is based on his conduct up to this point." Trial continued.[11]

Crack cocaine and a pistol had been found in Appellant's trunk after the crash. The pistol was in a plastic box in the trunk and the crack cocaine (fifty-five grams) was in a plastic bag

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9 R. 634, l. 19 – 635, l. 5; R. 186, l. 16 – 187, l. 10.

10 R. 166, l. 15 – 171, l. 1; R. 175, ll. 14-17.

11 R. 193, l. 20 – 194, l. 25.

inside of a drawstring bag which contained laundry. The State used DNA on the laundry and other items in the trunk to tie Appellant to the drugs. Clothing inside the laundry bag was tested for DNA. DNA analysis showed that several items of clothing likely had Appellant's DNA on them. For example, as to the test results on a mixture of DNA from a pair of underwear, "the results for those comparisons were that the DNA profile is approximately 62 octillion times more likely if Ray Kelly and two unidentified unrelated individuals contributed to the mixture than if three unidentified unrelated individual contributed to the mixture.[12]

The State had obtained Appellant's DNA standard by getting a search warrant for Appellant's blood. Appellant was taken to the hospital for medical treatment after the crash. It was a swab from this blood sample, taken for medical purposes, that was used for comparison by the DNA analyst. Investigator Davis said he went to the hospital, showed the attending nurse the search warrant, and learned Appellant had been assigned a "trauma name" by the hospital. Davis then obtained vials of blood labeled "TR 2020 Montana 078." Davis did not know who drew the blood and he was not present when it was collected. Davis testified,

> I met Greenville County Public Safety, their forensic services at the hospital. And with the—and some Greenville County deputies that were either sitting with at the time later identified as Mr. Kelly . . . I identified the search warrant to the attending nurse for him to confirm that that was the subject who I had listed in the search warrants since we only knew him by a trauma name to execute the search warrant. And then I, also, took the search warrant over to where the blood was kept and showed then that in order to obtain the correlating blood to that trauma name.[13]

Defense counsel objected to the blood and DNA evidence based on a fatally defective chain of custody, since the State could not identify who had drawn and labeled the blood.

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12 R. 433, l. 8 – 435, l. 18; R. 541, l. 19 – 543, l. 19; R. 578, l. 11 – 579, l. 23.

13 R. 466, l. 10 – 481, l. 8; R. 480, ll. 3-16; R. 572, ll. 19-25.

Defense counsel argued: "their failure to identify the person who drew and labeled the blood purported to be that of Mr. Kelly renders the chain fatally defective." The court ruled the State had established chain of custody; the blood and DNA evidence was admitted.[14]

Witnesses, including an expert in accident reconstruction, testified about the crash. The officers involved in the traffic stop, crash, and subsequent scene were equipped with body-worn cameras and microphones, and their cars had dashboard cameras. Initially, some of these recordings came in without objection (State's Exhibits #1 – 3; State's Exhibit #5). However, when the prosecutor piled on, counsel objected pursuant to Rule 403, SCRE. These exhibits included video footage, audio recordings, and photographic evidence (State's Exhibit #6; State's Exhibit #7; State's Exhibit #8; State's Exhibit #9; State's Exhibit #26), and are on file with this Court. Counsel argued the danger of unfair prejudice occasioned by this cumulative presentation substantially outweighed the probative value of the evidence. The court overruled the objections. The State repeatedly played and replayed depictions of Decedent being hit by the tractor trailer and Decedent as he lay dying in the road. This included futile attempts to render aid to Decedent and his last remarks.[15]

As the trial proceeded, defense counsel made a motion that uniformed law enforcement officers in the gallery be instructed to appear in plainclothes. Defense counsel noted that in addition to four plainclothes SLED officers and two uniformed courthouse deputies, the prior day there were:

> any number of officers in the courtroom. I think the danger is of unfair prejudice that Mr. Kelly is somehow this violent person that requires this top-level security . . . **I am concerned that the**

[14] R. 467, l. 17 – 481, l. 8; R. 475, ll. 16-19; R. 476, l. 6 – 477, l. 10; R. 572, ll. 19-25.

[15] R. 359, l. 10 – 360, l. 11; R. 400, ll. 2-20; R. 206, ll. 6-16; R. 255, l. 14 – 258, l. 1; R. 281, ll. 11-16; R. 284, ll. 3-15; R. 327, ll. 7-25; R. 368, ll. 4-12; R. 402, l. 18 – 403, l. 14.

> **multitude of officers present presents an unfair prejudice to which he cannot sufficiently respond**. I do appreciate the plain clothes officers. I believe in other trials I have been in the Court has instructed that any officers who aren't witnesses not appear in uniform so we don't kind of get this thin blue line law enforcement kind of pressure on the secure [sic]. And **I would ask this Court impose that similar restriction, that if you're not a witness and you want to come and support your fellow officer that you do so in plain clothes**."[16]

The court ruled that, "this is a matter involving three victims who were sheriff's deputies. And that's just the fact of the matter. And I am not inclined to grant that motion requiring them to change clothes."[17]

Counsel subsequently renewed her motion, noting there were *now twenty or twenty-five officers in the courtroom*. Defense counsel moved that the officers be instructed to wear plainclothes, or that the court send them into another courtroom to view the proceedings via livestream. Defense counsel noted the number of officers was "overwhelming" and "unduly prejudicial." "I feel the need to renew our motion given the number is climbing." The court denied the motion.[18]

Later, counsel moved for a mistrial based on the overwhelming presence of law enforcement officers in the courtroom. Counsel renewed her motion "to limit the number of law enforcement officers in the courtroom, particular [sic] during the closing argument. *We're now upwards of 35 to 40 officers in this courtroom, some in tactical gear, various uniforms of any kind*." "[T]he prejudice to the Defendant is overwhelming. It could be live streamed in another courtroom, They could have appeared in any—plain clothes. There's any number of options that

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16 R. 183, l. 2 – 184, l. 19.

17 R. 185, l. 25 – 186, l. 4.

18 R. 600, l. 7 – 601, l. 14.

were available and have been raised by the Defense that would have mitigated that prejudice. And so for that, we ask the Court to consider alternatives so as not to unduly prejudice the jury." The court denied the motions. After the verdicts were returned, counsel moved for a new trial based upon "passion and prejudice" due to "the heavy law enforcement presence." The court denied the motion. Notably, at no time during counsel's motions did the solicitor or the trial court dispute her estimates of the number of officers in the room or her description of them as being in uniform, with some in tactical gear.[19]

The State proceeded on a theory of *Mouzon*[20] malice in this case; the defense contested malice. The jury struggled with the case, deliberating for just shy of four hours. The jury asked, "Is manslaughter an option for a guilty charge or is murder the only option?" It asked for written instructions. It asked whether it could see statements from the truck drivers (the truck drivers were referenced in the trial but not called as witnesses). Ultimately, the jury acquitted Appellant of the underlying traffic offenses which were the basis for the traffic stop, but it convicted him of the other offenses.[21]

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19 R. 624, l. 9 – 269, l. 9; R. 634, ll. 1-16; R. 688, l. 19 – 689, l. 13.

20 *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957), held that evidence is sufficient to sustain a verdict of murder where, "Although it may be fairly assumed there was no actual intent to kill or injure another, there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice."

21 R. 682, l. 21 – 685, l. 14. The jury notes are located at pp. 699-700 of the Record on Appeal.

1.

<u>The trial court erred in forcing Appellant, who was on trial for murdering a police officer, to appear before the jury in a restraint chair, where the restraint chair was not justified by the circumstances, since restraints must be case specific.</u>

Appellant's failure to come out of the holding cell was not a threat to courtroom security that justified requiring him to appear before the jury in a restraint chair. Similarly, although Appellant's pro se objections were obnoxious, speech is not conduct and it did not necessitate total physical restraint. The court did not assess whether the restraint chair was necessary—instead, it seemingly deferred to courtroom security's decision.

Standard of review

"In criminal cases, the appellate court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Hawes*, 411 S.C. 188, 190, 767 S.E.2d 707, 708 (2015) (citations omitted). "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. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011). "Whether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security." *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995). *See State v. Heyward*, Op. No. 28182 (S.C. Sup. Ct. filed Oct. 5, 2023) (Howard Adv. Sh. No. 40 at 11) (trial court's failure to assess whether shackles were necessary or to ensure the jury could not see them was an abuse of discretion).

Discussion

"[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). "Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id.*, 397 U.S. at 343-44.

The defendant in *Allen* argued with the judge in an abusive and disrespectful manner and threatened the judge, saying that the judge would be a "corpse" after the lunch break. The defendant tore counsel's file and threw the papers on the floor. The court repeatedly warned the defendant it would remove him after another outburst, removed him after outbursts, permitted him in again later, only for more problems to ensue, including vile and abusive language. Eventually, the defendant was permitted to be present for the remainder of the trial. *Id.*, 397 U.S. at 340-41.

The Supreme Court concluded, "there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id.*, 343 U.S. at 344. "Allen's behavior was clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his

total physical restraint." *Allen*, 397 U.S. at 346. However, "no person should be tried while shackled and gagged except as a last resort." *Id.* at 344.

"Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Deck v. Missouri*, 544 U.S. 622, 630 (2005). "[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Id.*, 544 U.S. at 632. "Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." *Id.* "[A] judge [may], in the exercise of his or her discretion, [] take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." *Id.*, 544 U.S. at 633.

"This careful balancing of the competing interests—and articulation of the balancing on the record for the benefit of appellate courts—is necessary to honor the defendant's due process rights whenever the State seeks to restrain the defendant in the jury's presence." *State v. Heyward*, Op. No. 28182 (S.C. Sup. Ct. filed Oct. 5, 2023) (Howard Adv. Sh. No. 40 at 11). "[A] defendant in a criminal trial may not be required to wear handcuffs, leg shackles, or other restraints in the presence of the jury unless the trial court makes specific findings on the record as to the particular reasons the restraints are necessary. If the court finds restraints are necessary, it must make every reasonable effort to ensure the restraints are not visible to the jury." *Heyward*, Howard Adv. Sh. No. 40 at 11.

The trial court did not undertake the careful balancing of competing interests and it did not articulate why a verbally "disruptive" defendant who refused to come out of the holding cell required a restraint chair. This was error. The facts of *Allen* are not like the facts in this case. Appellant did not use vile language, destroy property, or threaten to kill the judge, as Allen did. Total physical restraint, a measure of last resort, was not befitting these circumstances. Moreover, Appellant stated he did not want to be present. When Appellant appeared before the court in the restraint chair, the trial court should have explored alternatives instead of leaving Appellant in the chair before the jury.

The trial court had other options. If it found Appellant was verbally disruptive, it could have gagged him. *Illinois v. Allen*, 397 U.S. at 343-44 (one permissible way for judge to handle obstreperous defendant is to gag him). If it found Appellant's refusal to come out of his cell violated courtroom decorum, it could have concluded Appellant had waived his right to proceed pro se and appointed standby counsel to act as counsel. *United States v. Bush*, 404 F.3d 263, 271 (4th Cir. 2005) ("At bottom, the *Faretta* right to self-representation is not absolute, and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.") (cleaned up). The court could have excluded Appellant from the courtroom.[22] *In Interest of Dwayne M.*, 287 S.C. 413, 414, 339 S.E.2d 130, 130 (1986) (citing *Illinois v. Allen*, 397 U.S. 337) ("A defendant may be excluded from the courtroom when his conduct is disruptive or is interfering with the progress of the trial."). If the court had found Appellant presented a physical threat (instead of merely finding Appellant was "disruptive"), a stun belt would have been a less prejudicial manner of restraint, since it would

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22 This was not a case in which identity was in dispute. *See State v. Moore*, 308 S.C. 349, 351, 417 S.E.2d 869, 870 (1992) (defendant has no constitutional right to absent himself from trial in order to preclude in-court identification of him by State's witnesses).

not have been visible to a jury. 23A C.J.S. Criminal Procedure and Rights of Accused § 1638 (2023) (stun belt is prisoner restraint placed around defendant's midsection, generally worn so it is not readily visible to jury; when activated it delivers high-voltage electric shock throughout defendant's body).

The court abused its discretion. *See State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (abuse of discretion occurs when trial court's conclusions either lack evidentiary support or are controlled by an error of law); *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."). There were multiple ways in which the trial court could have used its discretion to fashion an appropriate remedy for these facts. Instead, the court seemingly deferred to courtroom security's decision to put Appellant in a restraint chair.

Appellant was restrained in front of the jury like a dangerous lunatic. On file with this Court are Court's Exhibits #4 – 5 (photographs of Appellant in the restraint chair that were published by the media), and Court's Exhibits #9 – 10 (video footage of him in the device). Appellant's appearance before the jury in the restraint chair assailed the presumption of innocence. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). "Visible shackling undermines the presumption of innocence." *Deck v. Missouri*, 544 U.S. at 630.

The fact that Appellant appeared mid-trial in the restraint chair was also problematic, as it invited speculation from the jury that Appellant had harmed someone in the courtroom. *See Reese v. State*, Op. 6024 (S.C. Ct. App. filed Sept. 6, 2023) (Howard Adv. Sh. No. 35 at 48)

(shackles could have suggested court was concerned defendant would experience a violent outburst; more problematically, appearance of shackles after opening statements could imply defendant exhibited conduct between opening statements and beginning of testimony that necessitated shackling).

"[S]hackling is "inherently prejudicial." *Deck*, 544 U.S. at 635 (quoting *Holbrook v. Flynn*, 475 U.S. at 568). "[W]here 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. The State must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained." *Deck*, 544 U.S. at 635 (cleaned up). *See State v. Heyward*, Op. No. 28182 (S.C. Sup. Ct. filed Oct. 5, 2023) (Howard Adv. Sh. No. 40 at 11) (error did not require reversal where State conclusively proved defendant's guilt with other overwhelming evidence such that no other rational conclusion could be reached except that he is guilty of each crime).

This error was explosively prejudicial. The State proceeded on a theory of *Mouzon* malice. The jury struggled with the case; in particular, it struggled with malice. It deliberated for close to four hours, asked for written instructions, and asked if it could convict Appellant of manslaughter. The restraint chair unfairly went to malice by portraying Appellant as a wholly depraved killer who must be tied up and wheeled into the courtroom for the safety of all decent people. *Deck*, 544 U.S. at 635; *Heyward*, Op. No. 28182; U.S. CONST. amend. V; U.S. CONST. amend. XIV.

2.

The trial court erred in requiring Appellant to remain shackled throughout his trial for murdering a police officer, where shackling was not justified by the circumstances, since shackling must be case specific.

The court ruled that Appellant's shackling was justified by his conduct. Appellant had committed no misconduct in the courtroom, and he had not threatened any misconduct. Standby counsel had stepped in as counsel, so any verbal disruptions caused by Appellant's earlier pro se representation had ceased. The court did not balance the competing interests at stake. Shackles were not justified on these facts.

Standard of review

"In criminal cases, the appellate court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Hawes*, 411 S.C. 188, 190, 767 S.E.2d 707, 708 (2015) (citations omitted). "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. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011). "Whether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security." *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995). *See State v. Heyward*, Op. No. 28182 (S.C. Sup. Ct. filed Oct. 5, 2023) (Howard Adv. Sh. No. 40 at 11) (trial court's failure to assess whether shackles were necessary or to ensure the jury could not see them was an abuse of discretion).

Discussion

"Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Deck v. Missouri*, 544 U.S. 622, 630 (2005). "[S]hackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large[.]" *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986). "The law has long forbidden routine use of visible shackles during [a jury trial]; it permits a State to shackle a criminal defendant only in the presence of a special need." *Deck*, 544 U.S. at 626. "[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Id.*, 544 U.S. at 632.

"[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck*, 544 U.S. at 629. "Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." *Id.* "[A] judge [may], in the exercise of his or her discretion, [] take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." *Deck*, 544 U.S. at 633.

"This careful balancing of the competing interests—and articulation of the balancing on the record for the benefit of appellate courts—is necessary to honor the defendant's due process rights whenever the State seeks to restrain the defendant in the jury's presence." *State v. Heyward*, Op. No. 28182 (S.C. Sup. Ct. filed Oct. 5, 2023) (Howard Adv. Sh. No. 40 at 11). "[A]

defendant in a criminal trial may not be required to wear handcuffs, leg shackles, or other restraints in the presence of the jury unless the trial court makes specific findings on the record as to the particular reasons the restraints are necessary. If the court finds restraints are necessary, it must make every reasonable effort to ensure the restraints are not visible to the jury." *Id.*

Appellant was shackled at the wrists and ankles and chained around his body. *See* Court's Exhibits # 9 – 10. It was undisputed the shackles were audible to the jury. The trial court erred where it did not balance and articulate the competing interests to determine whether the shackles were necessary. Appellant had not attempted to assault anyone or intimidate the jury. He had not committed mis*conduct* that would justify the shackles. Instead, Appellant had been *verbally* disruptive to courtroom decorum prior to his representation by counsel, and he had refused to come out of the holding cell. When counsel made a motion to remove the shackles, Appellant's pro se verbal disruptions were no longer a problem since he was represented by a lawyer. As counsel stated to the court, Appellant had agreed he would thereafter come out of the holding cell. These restraints were not "case specific." *Deck v. Missouri*, 544 U.S. at 633.

"[S]hackling is "inherently prejudicial." *Deck v. Missouri*, 544 U.S. at 635 (quoting *Holbrook v. Flynn*, 475 U.S. at 568). "[W]here 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. The State must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained." *Deck*, 544 U.S. at 635 (cleaned up). *See State v. Heyward*, Op. No. 28182 (S.C. Sup. Ct. filed Oct. 5, 2023) (Howard Adv. Sh. No. 40 at 11) (error did not require reversal where State conclusively proved defendant's guilt with other overwhelming evidence such that no other rational conclusion could be reached except that he is guilty of each crime).

It was undisputed the shackles were audible. The State proceeded on a theory of *Mouzon* malice. The jury struggled with the case. In particular, it struggled with malice. As seen, the jury deliberated for close to four hours and asked if it could convict Appellant of manslaughter. It acquitted Appellant of the traffic offenses. The shackles tainted Appellant with an aura of malice and wickedness. Every time Appellant moved, the jury was reminded that he was too dangerous to be unfettered among others. *Deck*, 544 U.S. at 635; *Heyward*, Op. No. 28182; U.S. CONST. amend. V; U.S. CONST. amend. XIV.

3.

<u>The trial court erred in Appellant's trial for murdering a police officer, where it failed to exercise any discretion regarding the large number of uniformed officers in the gallery (35 – 40 officers in uniform including tactical gear), since Appellant had the right to a fair trial free from outside influence.</u>

Counsel repeatedly noted the growing number of uniformed officers in the courtroom and proposed several reasonable measures the court could take to balance the interests of Appellant in receiving a fair trial and the audience's interest in attending a public trial. The court failed to exercise its discretion. It did not take any action to mitigate prejudice to Appellant from the overwhelmingly partisan atmosphere in the courtroom.

Standard of review

"Appellate courts apply the 'discretion' standard to review decisions trial courts make on procedural questions . . . , decisions to admit or exclude evidence, and other decisions." *Morris v. BB&T Corp.*, 438 S.C. 582, 586, 885 S.E.2d 394, 396 (2023).

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)).

Discussion

"The Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors." *State v. Bryant*, 354 S.C.

390, 395, 581 S.E.2d 157, 160 (2003) (citing *Estelle v. Williams*, 425 U.S. 501 (1976); *Irvin v. Dowd*, 366 U.S. 717 (1961)). The South Carolina Constitution likewise provides the rights to trial by an impartial jury and due process of law. S.C. Const. art. I, §§ 3 & 14. "Due process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). "[I]t is required that the jury render its verdict free from outside influences of whatever kind and nature." *Bryant*, 354 S.C. at 395, 581 S.E.2d 160 (quoting *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993)).

In *Holbrook v. Flynn*, 475 U.S. 560, 571 (1986), the United States Supreme Court rejected a habeas corpus challenge to the presence of four uniformed troopers sitting in the front row of the gallery throughout the joint trial of six codefendants, since four troopers for six defendants was "unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." "Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted *so long as their numbers or weaponry do not suggest particular official concern or alarm*." *Id.*, 475 U.S. at 569 (emphasis added). "To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.'" *Id.*, 475 U.S. at 569 (quoting *Kennedy v. Cardwell*, 487 F.2d 101, 108 (6th Cir. 1973) (*cert. denied*, 416 U.S. 959 (1974)). *See McCloskey v. Boslow*, 349 F.2d 119, 121 (4th Cir. 1965) (presence of armed guards in courtroom may reach a point where trial is a farce and a fair trial is impossible) (quoting *Odell v. Hudspeth*, 189 F.2d 300, 302 (10th Cir. 1951) (*cert. denied* 342 U.S. 873 (1951)).

"Trials should be conducted in an atmosphere of impartiality; the jury should be allowed to weigh the evidence without feeling the terror of impending doom if they acquit the defendant.

When a judge conducts a trial in a way that can only impress upon the jury the dangerousness of the men on trial, this impartial search for truth aborts." *Dorman v. United States*, 435 F.2d 385, 396–98 (D.C. Cir. 1970). "Any judge who has sat with juries knows that, in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (quoting *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting)).

The trial court erroneously permitted the atmosphere in the courtroom to impress upon the jury that Appellant was dangerous, which posed an unacceptable risk of prejudice. Counsel repeatedly brought the large and growing numbers of uniformed officers to the court's attention. Neither the court nor the prosecutor disagreed with counsel's estimates of the number of uniformed officers present, or disagreed that some were in tactical gear. The court took no action to avert prejudice, such as requiring audience members to wear plainclothes or attend the trial in a virtual courtroom. Absent such measures, the court should have declared a mistrial. *State v. Rowlands*, 343 S.C. at 457-58, 539 S.E.2d at 719 (mistrial inquiry must be made in the context of the specific difficulty facing the trial judge); *State v. Makins*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021) (mistrial is serious and extreme measure taken when the prejudice cannot be removed in any other way). The large and armed law enforcement presence in the courtroom deprived Appellant of a fair trial: the courtroom was no longer a suitable place for an impartial search for the truth. *Holbrook v. Flynn*, 475 U.S. at 572; US. CONST. amend. VI; US. CONST. amend. XIV; S.C. Const. art. I, §§ 3 & 14.

The jury struggled with the case. It deliberated for nearly four hours, and asked whether it could convict Appellant of manslaughter in a *Mouzon* malice case. The atmosphere was already poisonous due to the jury seeing Appellant tied down in a restraint chair and hearing him chained

and shackled. A phalanx of uniformed police officers in the courtroom likewise portrayed Appellant as a vicious killer. The error requires reversal. *See State v. Johnson*, 422 S.C. 439, 458, 812 S.E.2d 739, 749 (Ct. App. 2018) (circuit court did not err in denying mistrial motion where defendant brought into the courthouse in handcuffs and surrounded by police personnel; record failed to demonstrate any juror observed this activity); *State v. Cameron*, 311 S.C. at 208, 428 S.E.2d at 12 (reversal required due to private communication between court official and jury, since it did not clearly appear the subject matter of the communication was harmless and could not have affected the verdict).

4.

<u>The trial court erred in admitting repeated depictions (video, audio, and photographic) of the fatal crash and its aftermath, where the probative value of the cumulative evidence was substantially outweighed by the danger of unfair prejudice, since the evidence should have been excluded pursuant to Rule 403, SCRE.</u>

The circumstances of Decedent's killing were amply depicted by testimony and by previously admitted video footage. The cumulative presentation of additional evidence of Decedent being hit by the truck and slowly dying in the road occasioned unfair prejudice. The evidence should have been excluded pursuant to Rule 403, SCRE.

Standard of review

The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *see also State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)).

Discussion

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one." *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240,

247 (2001). “The determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case.” *State v. Holland*, 385 S.C. 159, 171, 682 S.E.2d 898, 904 (Ct. App. 2009) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)).

“Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are not necessary to substantiate material facts or conditions.” *State v. Lee*, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012) (cleaned up). *See State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (testimony of the forensic pathologist negated any arguable evidentiary value of autopsy photographs); *State v. Kornahrens*, 290 S.C. 281, 288–89, 350 S.E.2d 180, 185 (1986) (in guilt phase of a trial, photographs of murder victims should be excluded where facts they are intended to show have been fully established by competent testimony); *State v. Hess*, 279 S.C. 14, 18, 301 S.E.2d 547, 549-50 (1983) (limitation of defense testimony upheld where it was merely cumulative to other testimony).

Footage from Deputies Wasserman and Harrison was admitted without objection. Numerous witnesses testified about the crash, including a highway patrol officer qualified as an expert in accident reconstruction. The circumstances were fully established by other competent evidence. The repeated admission and publication of cumulative evidence, State’s Exhibits #7 (video footage), #8 (video footage and audio recording), #9 (audio recording), and #26 (photograph), was error. State’s Exhibit #8 is particularly ghastly—slowed-down video footage of Decedent being dragged across the interstate after he was fatally hit by traffic. Repeated depictions of Decedent’s needless death in the line of duty, and the reactions of the other officers in the moment, were likely to arouse the sympathy and prejudice of the jury. The evidence should have been excluded. Rule 403, SCRE.

This error was reversible. As seen, the jury struggled with the case, and it particularly struggled with malice. The repeated publication of Decedent's tragic death could have unfairly tipped the scales for conviction. *See Middleton*, 288 S.C. at 25, 339 S.E.2d at 694 (reversal based in part upon gruesome autopsy photographs); *State v. Nelson*, 440 S.C. 413, 426, 891 S.E.2d 508, 514 (2023) (reversal where gruesome autopsy photos unnecessarily created the potential for the jury to convict based on inflamed emotions).

5.

The trial court erred in admitting evidence pertaining to a blood draw purportedly of Appellant's blood, which was taken for medical purposes and demanded by law enforcement for prosecution purposes, where the chain of custody was wholly inadequate, since the State must establish a chain of custody as far as practicable.

The court admitted blood and DNA evidence in error, since the State did not establish the identity of the person who drew the blood. Also, the blood vials were labeled "TR 2020 Montana 078," which was a "trauma name" instead of a first name and surname. The State failed to establish the identity of any hospital personnel who labeled the blood and could confirm that Appellant was "TR 2020 Montana 078."

Standard of review

"'The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)). "'In criminal cases, the appellate court sits to review errors of law only.'" *State v. Pulley*, 423 S.C. 371, 815 S.E.2d 461 (2018) (quoting *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (quoting *Baccus*, 367 S.C. at 48, 625 S.E.2d at 220)).

Discussion

"The State must prove a chain of custody for a blood sample from the time it is drawn until it is tested." *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "This Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Hatcher*, 392 S.C. 86,

91, 708 S.E.2d 750, 753 (2011) (cleaned up). "Where an analyzed substance has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007).

"Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility. Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206 (cleaned up). "[W]e have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the blood was not established at least as far as practicable." *State v. Carter*, 344 S.C. at 424, 544 S.E.2d at 837.

In *State v. Williams*, 301 S.C. 369, 370, 392 S.E.2d 181, 182 (1990), the Supreme Court held the State failed to sufficiently establish the chain of custody of the defendant's blood test where no one present in the emergency room could identify who sealed and labeled the blood with the defendant's patient number, who transported it to the laboratory, and the defendant's emergency room record was originally mislabeled. These breakdowns cumulatively rendered the chain of custody fatally defective. *See State v. Pulley*, 423 S.C. 371, 378–79, 815 S.E.2d 461, 465 (2018) (chain of custody was not established as far as practicable where testimony on who handled the cocaine amounted to conjecture); *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 628-29, 614 S.E.2d 642, 646 (2005) (Chain was not fatally defective where phlebotomist who drew the blood was identified and signed the chain of custody form, and the only person not

identified in the chain was the courier who transported the samples. The person who received the samples signed off that the seals were intact upon receipt after transport.).

The trial court reversibly erred by admitting the blood and the DNA evidence, given the State's failure to establish the identity of the persons who drew and labeled the blood, and could confirm Appellant's blood was labeled with the "Montana" identifier. The evidence was used to prove Appellant's guilt in the drug trafficking offense and the weapons offense. *State v. Pulley*, 423 S.C. at 380, 815 S.E.2d at 465–66 (James, J., concurring) (State "must satisfactorily establish the chain of custody of evidence passing from hand to hand to hand"); *State v. Sweet*, 374 S.C. at 5, 647 S.E.2d at 205 (court committed reversible error by admitting evidence of drugs purchased by unknown confidential informant because chain of custody was defective); *State v. Carter*, 344 S.C. at 424, 544 S.E.2d at 837 (blood evidence properly admitted where no missing link in the chain of custody).

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of August, 2024.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE, RESPONDENT,

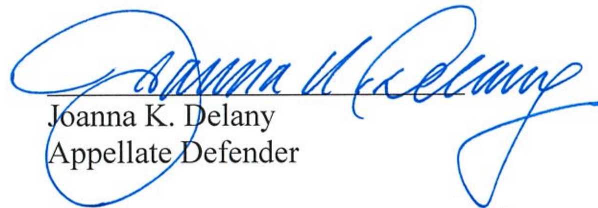
V.

RAY L. KELLY, APPELLANT

APPELLATE CASE NO. 2022-001449

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 1st day of August, 2024.



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From: Warren, Kaylynn
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Subject: 2022-001449 The State v. Ray L. Kelly
Date: Thursday, August 1, 2024 11:33:00 AM
Attachments: 2022-001449 The State v. Ray L. Kelly Final Brief of Appellant.pdf

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Good Morning,

Attached for service in the above-referenced case is the Final Brief of Appellant which will be filed today, August 1, 2024, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
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