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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 25-UP-247 (S.C. Ct. App. Filed July 16, 2025)

Lower Court Case No. 2020-GS-23-06536

THE STATE,

RESPONDENT,

V.

RAY KELLY,

PETITIONER

APPELLATE CASE NO. 2025-001854

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 13, 2025.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in affirming the trial court's decision to force Petitioner to appear before the jury in a restraint chair, where the Court of Appeals held the trial court did not abuse its discretion simply because it could have done something differently, where this was essentially a finding that if any form of restraint was justified, all forms of restraint were justified, since restraints must be case specific and the restraint chair was not justified by the circumstances?

2.

Whether the Court of Appeals erred in affirming the trial court's decision to allow a large number of uniformed officers in the gallery (35 – 40 officers; tactical gear), where the Court of Appeals found no error and no prejudice because the officers did not cross the line from spectators to activists, where the arrangements posed an unacceptable risk of impermissible factors coming into play, since the judge allowed the courtroom to appear to the jury as a partial, partisan place, and since Petitioner had the right to a fair trial free from outside influence?

3.

Whether the Court of Appeals erred in affirming the admission of repeated depictions of the fatal crash and its aftermath including the decedent being hit by the tractor trailer, slowly dying in the road, his last words, and the reactions of his fellow officers watching all this, where the Court of Appeals concluded the evidence was not unfairly prejudicial because it was not

gruesome or graphic, since the evidence was incredibly inflammatory and the probative value of the needlessly cumulative evidence was substantially outweighed by the danger of unfair prejudice and should have been excluded pursuant to Rule 403, SCRE?

4.

Whether the Court of Appeals erred in affirming the trial court's ruling requiring Petitioner to remain audibly shackled throughout trial, where the Court of Appeals found no error because the shackles were not visible and no prejudice because Petitioner was already dressed in scrubs, where the jury can see as well as hear, and where shackling goes to malice in a way that scrubs do not, and since shackling, which must be case specific, was not justified by the circumstances?

STATEMENT OF THE CASE

During the November term of 2020, a Greenville County Grand Jury indicted Petitioner 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 Petitioner 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 Petitioner for a third count of resisting arrest with assault. Petitioner was also charged with speeding and following too closely. R. 701-714; R. 100, l. 21 – 101, l. 10.

Petitioner 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. Petitioner appeared pro se with Mindy Lipinski as standby counsel during initial portions of the trial. Standby counsel subsequently stepped in to represent Petitioner as his counsel. R. 61; R. 166, l. 17 – 171, l. 20; R. 73, ll. 4-24. Petitioner was acquitted of speeding and following too closely.

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

On September 30, 2022, Petitioner served notice of intent to appeal. The Court of Appeals heard oral argument on April 16, 2025. On July 16, 2025, it issued an opinion affirming Petitioner's convictions. *State v. Kelly*, Op. No. 2025-UP-247 (S.C. Ct. App. filed July 16, 2025). App. 73 – 81. On July 31, 2025, Petitioner served his petition for rehearing. App. 82 – 97. On August 13, 2025, the Court of Appeals denied rehearing. App. 98 – 99. This petition for writ of certiorari follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari because substantial constitutional issues are directly involved, and the decision of the Court of Appeals is in conflict with prior decisions of this Court. Rule 242(b), SCACR.

Substantial constitutional issues are involved in Issues 1, 2, and 4. Issues 1 and 4 address whether Petitioner should have been tried before the jury while strapped into a restraint chair, and, after he was removed from the restraint chair, while audibly shackled. "[N]o person should be tried while shackled and gagged except as a last resort." *Illinois v. Allen*, 397 U.S. 337, 344 (1970). "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. 622, 630 (2005). Issue 2 involves whether the court permitting a large number of uniformed officers to attend the trial without taking alternative measures, such as requiring them to wear plainclothes, presented "an unacceptable risk" "of impermissible factors coming into play" in Petitioner's trial. *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986).

Issues 1 and 4 (restraint chair and shackles) were decided in conflict with *State v. Heyward*, 441 S.C. 484, 493, 895 S.E.2d 658, 663 (2023), which held, "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." Issue 2 (uniformed officers) was decided in conflict with *State v. Hill*, 331 S.C. 94, 101, 501 S.E.2d 122, 126 (1998) ("Inherent prejudice occurs when an unacceptable risk is presented of impermissible factors coming into play") (cleaned up).

The Court of Appeals' resolution of Issue 3 contradicts decisions of this Court regarding the exclusion of what was incredibly inflammatory, needlessly cumulative evidence pursuant to Rule 403, SCRE. *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).

ARGUMENT

1.

The Court of Appeals erred in affirming the trial court's decision to force Petitioner to appear before the jury in a restraint chair, where the Court of Appeals held the trial court did not abuse its discretion simply because it could have done something differently, where this was essentially a finding that if any form of restraint was justified, all forms of restraint were justified, since restraints must be case specific and the restraint chair was not justified by the circumstances.

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 Petitioner. Petitioner 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 Petitioner's car. When Wasserman told Petitioner of his intention to search, Petitioner tried to run and get back in his car. A struggle ensued which included Petitioner, Wasserman, Decedent, and a third officer, Deputy Ledbetter.[1]

The car was parked close to the white line which demarcated the shoulder from the busy road. Interstate traffic sped by the struggling men. Petitioner 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 Petitioner's lap with Decedent's legs hanging out of the open driver's door. The car entered traffic while Decedent and Petitioner struggled over the steering wheel. The car and Decedent's lower body were smacked by an eighteen-wheeler. Decedent

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

was thrown from the car and rolled across the pavement to a stop; Petitioner's car was struck a second time by another interdiction unit, driven by Deputy Harrison, and Petitioner was thrown from the car. Although emergency medical personnel arrived quickly, Decedent died approximately twenty minutes later from blunt force injuries.[2]

Petitioner 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 Petitioner representing himself. Standby counsel was present. The arguments Petitioner made in his defense were ill-advised. Petitioner 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, Petitioner 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.[3]

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 Petitioner was now in "a special chair." Petitioner 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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2 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.

3 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 Petitioner was in the restraint chair.[4]

> 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.**[5]

The Solicitor made two body-worn camera recordings of what happened in Petitioner'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 Petitioner refused to come out of the holding cell, approximately nine officers approached and entered the cell with a

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4 R. 131, l. 13 – 134, l. 10.

5 R. 134, l. 11 – 135, l. 12 (emphasis added).

restraint chair, attempted to place Petitioner in the restraint chair, and Petitioner did not cooperate. Instead, he squirmed, struggled, and jerked his shackled hands around. Petitioner 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 Petitioner in the courtroom in the restraint chair that were published by the media. These photographs are also on file with this Court.[6]

The trial proceeded through the prosecution's opening statement. Petitioner did not give an opening statement. When the State finished its direct examination of its first witness, Petitioner asked to speak with standby counsel. There was a break in proceedings and Petitioner agreed to be represented by standby counsel. He also told standby counsel he would walk into the courtroom. Thereafter, the court noted Petitioner was no longer in the restraint chair, but he remained shackled except for his writing hand. The court broke for the evening.[7]

The Court of Appeals held that while it recognize[d] the harm inherent in the jury seeing restraints on a defendant," Petitioner was "extraordinarily disruptive," "completely uncooperative and refused to answer basic question posed by judges," "continued to disrupt the proceedings by refusing to participate even though he was representing himself," and "refus[ed] to exit his holding cell before opening statements." *State v. Kelly*, Op. No. 2025-UP-247 at 3. App. 75. It concluded that "the trial court was aware of the applicable law and that the court ruled in light of that law and based on the facts of this case. This was accordingly an appropriate exercise of the trial court's discretion." *Id.* App. 75. "Appellant contends the trial court could

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

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

have utilized other options available under *Illinois v. Allen*, but the trial court does not abuse its discretion simply because it could have done something differently." *Id.* App. 76.

Discussion

Petitioner'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 Petitioner's pro se objections were obnoxious, speech is not conduct and it did not necessitate total physical restraint—total physical restraint was not tailored to the facts and was thus prejudicial error. *Deck v. Missouri*, 544 U.S. 622, 632 (2005).

"[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). "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 (emphasis added). The defendant in *Allen* argued with the judge in an abusive manner and threatened the judge, saying that the judge would be a "corpse" after the lunch break. Allen tore counsel's file and threw the papers on the floor. The court repeatedly warned Allen it would remove him after another outburst, removed him after further outbursts, permitted him in again later, only for more problems to ensue, including vile and abusive language. Eventually, Allen 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 (emphasis added). However, "no person should be tried while shackled and gagged except as a last resort." *Id.* at 344.

"[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." *Deck v. Missouri*, 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 (emphasis added). "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." *State v. Heyward*, 441 S.C. 484, 493, 895 S.E.2d 658, 663 (2023).

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. The facts of *Allen* are not like the facts in this case. Petitioner did not use vile language, destroy property, or threaten to kill the judge, as Allen did. Moreover, Petitioner stated he did not want to be present. Total physical restraint, a measure of last resort,

was not befitting these circumstances; it was not a tailored response. When Petitioner appeared before the court in the restraint chair, the trial court should have explored alternatives instead of leaving him in the chair before the jury. Petitioner has been unable to locate a record of any defendant ever being tried in a restraint chair before the jury in this State. "[N]o person should be tried while shackled and gagged except as a last resort." *Allen*, 397 U.S. at 344.

The trial court had other options. If it found Petitioner 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 Petitioner's refusal to come out of his cell violated courtroom decorum, it could have concluded Petitioner 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 Petitioner from the courtroom.[8] *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 Petitioner presented a physical threat (instead of merely finding Petitioner was "disruptive"), a stun belt would have been a more appropriate manner of restraint, since it would not have been visible to a jury, like a restraint chair, the measure of last resort. 23A C.J.S. Criminal Procedure and Rights of Accused § 1638 (2023) (stun belt is prisoner restraint placed

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[8] 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).

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 trial 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."). 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 Petitioner in a restraint chair, and allowed him to be seen by the jury in the chair.

Petitioner was restrained in front of the jury like a dangerous lunatic. On file with this Court are Court's Exhibits #4 – 5 (photographs of Petitioner in the restraint chair that were published by the media), and Court's Exhibits #9 – 10 (video footage of him in the device). Petitioner'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 Petitioner appeared mid-trial in the restraint chair was also problematic, as it invited speculation from the jury that Petitioner had harmed someone in the courtroom. *See Reese v. State,* 441 S.C. 392, 406, 894 S.E.2d 295, 302 (Ct. App. 2023) (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). The jury asked if it could convict Petitioner of manslaughter. The restraint chair unfairly went to malice by portraying him as a wholly depraved killer who must be restrained for the safety of those in the courtroom. This error requires a new trial. *Deck*, 544 U.S. at 635.

2.

The Court of Appeals erred in affirming the trial court's decision to allow a large number of uniformed officers in the gallery (35 – 40 officers; tactical gear), where the Court of Appeals found no error and no prejudice because the officers did not cross the line from spectators to activists, where the arrangements posed an unacceptable risk of impermissible factors coming into play, since the judge allowed the courtroom to appear to the jury as a partial, partisan place, and since Petitioner had the right to a fair trial free from outside influence.

Relevant facts

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 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.**"[9]

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."[10]

Counsel subsequently renewed her motion, noting there were now twenty or twenty-five uniformed officers in the courtroom. 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. Counsel noted the number of uniformed officers was "overwhelming" and "unduly prejudicial." "I feel the need to renew our motion given the number is climbing." The court denied the motion.[11]

Later, counsel moved for a mistrial based on the overwhelming presence of uniformed 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

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9 R. 183, l. 2 – 184, l. 19.

10 R. 185, l. 25 – 186, l. 4.

11 R. 600, l. 7 – 601, l. 14.

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 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.[12]

The Court of Appeals found,

> **Our caselaw recognizes a clear distinction between a spectator and an activist**. A spectator, who merely observes a trial in open court, only becomes an "activist" when they attempt to influence the jury or otherwise participate in the trial through affirmative conduct. *See Paige*, 375 S.C. at 649, 654 S.E.2d at 303 . . . **Like the trial court in *Paige*, the trial court in this case took precautions to mitigate any prejudice that could arise from the gallery**. . . Moreover, no evidence suggests the uniformed officers crossed the line from spectators to activists . . . Accordingly, we find the trial judge did not err as he appropriately managed the gallery to prevent spectators from influencing the jury or disrupting the proceedings.

State v. Kelly, Op. No. 2025-UP-247 at 5 – 6 (emphasis added). App. 77 – 78.

Discussion

Although the Court of Appeals concluded the large number of uniformed officers in the courtroom did not behave as activists, the "spectator" versus "activist" distinction misapprehends the holdings of *Holbrook v. Flynn*, 475 U.S. 560 (1986) and *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998). "Whenever a courtroom arrangement is challenged as inherently prejudicial,

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

. . . the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play." *Holbrook v. Flynn*, 475 U.S. at 570 (cleaned up).

In *Hill*, 331 S.C. at 100, 501 S.E.2d at 125, the defendant contended the trial judge erred in refusing to clear the courtroom and the hallways of uniformed officers, and in refusing to order officers who were witnesses to dress in civilian clothing. It was unclear how many officers were present, although the defendant counted six people including bailiffs and solicitor's officer personnel. *Id.* This Court held that, "To prevail on such a claim, appellant must show that the measures taken in the courtroom created either an actual or inherent prejudicial effect on the jury. Inherent prejudice occurs when 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.*, 331 S.C. at 101, 501 S.E.2d at 126 (quoting *Holbrook v. Flynn*, *supra*). The Court found no inherent prejudice. *Id.*

The holdings of *Hill* and *Holbrook* did not rest on "activism." The question in this case was not whether the officers behaved as activists, but whether the courtroom appeared to the jury as an impartial place: whether the upwards of 35 to 40 uniformed officers, some in tactical gear, presented an unacceptable risk of impermissible factors coming into play. *Holbrook v. Flynn*, 475 U.S. at 570.

The Court of Appeals' conclusion that the trial court took measures to mitigate prejudice, as the trial court did in *State v. Paige*, 375 S.C. 643, 654 S.E.2d 300 (Ct. App. 2007), is unsupported by the record. In *Paige*, the trial court responded to the defendant's complaint prior to jury selection that several spectators had on buttons with the victim's picture on them by ruling that those spectators were not to sit in the front row or gesture to the buttons, and there was thereafter no further complaint by the defendant. *State v. Paige*, 375 S.C. at 646, 654 S.E.2d

at 302. The Court in *Paige* concluded there was "no evidence of record that the jurors in this matter were ever exposed to these button photos, and, if they were, whether they could perceive that they depicted the victim. Accordingly, we find no actual or inherent prejudice to Paige based on the record before us." *Id.*, 375 S.C. at 649, 654 S.E.2d at 303–04. The trial court in this case denied counsel's motions to fashion an alternative, such as requiring the officers to wear plainclothes or attend in a virtual courtroom, and it denied her mistrial motion. It simply gave standard instructions to the gallery to comport itself properly, as is done in virtually any murder case. It was undisputed the large presence of uniformed, tactically kitted-out officers were visible to the jury. Petitioner was prejudiced because the circumstances presented an unacceptable risk of impermissible factors coming into play. *Holbrook v. Flynn*, 475 U.S. at 570.

3.

The Court of Appeals erred in affirming the admission of repeated depictions of the fatal crash and its aftermath including the decedent being hit by the tractor trailer, slowly dying in the road, his last words, and the reactions of his fellow officers watching all this, where the Court of Appeals concluded the evidence was not unfairly prejudicial because it was not gruesome or graphic, since the evidence was incredibly inflammatory and the probative value of the needlessly cumulative evidence was substantially outweighed by the danger of unfair prejudice and should have been excluded pursuant to Rule 403, SCRE.

Relevant facts

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, his last words, and the reactions of the decedent's fellow officers at the scene. One of the officers at the scene was so overcome that as he strode towards Petitioner he had his gun taken away from him by other officers so that he would not shoot Petitioner on the spot.[13]

The Court of Appeals concluded,

> While the challenged videos were certainly similar to other evidence, we do not find they were needlessly cumulative. The videos showed different angles of this encounter, and this was relevant because Appellant questioned which of the multiple collisions caused the officer's fatal injuries. The videos likely allowed the officers to testify more effectively and likely helped the jury better understand the testimony as each video portrayed a different point of view as this incident developed.
>
> Furthermore, the probative value of the videos was not substantially outweighed by the danger of unfair prejudice because they contained no gruesome or graphic content that was likely to inflame the jury.

State v. Kelly, Op. No. 2025-UP-247 at 7. App. 79.

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[13] 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.

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).

Petitioner's arguments regarding the exhibits included not only the video addressed by the Court of Appeals, but also audio and photographic exhibits. 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. They were needlessly cumulative and were played and replayed. There was no need for the jury to hear the decedent's last words or watch him slowly die in the road. There was no need for the jury to see and hear the distress of his fellow officers as they watched their friend die. The exhibits were emotionally inflammatory regardless of whether they were "gruesome." There was no need for the jury to see and hear all of these exhibits and to see and hear the same exhibits again multiple times. 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. Rule 403, SCRE.

This error was reversible. As seen, the jury 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).

4.

The Court of Appeals erred in affirming the trial court's ruling requiring Petitioner to remain audibly shackled throughout trial, where the Court of Appeals found no error because the shackles were not visible and no prejudice because Petitioner was already dressed in scrubs, where the jury can see as well as hear, and where shackling goes to malice in a way that scrubs do not, and since shackling, which must be case specific, was not justified by the circumstances.

Relevant facts

Defense counsel made a motion to remove Petitioner'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.[14]

The defense contested malice. The jury deliberated for approximately four hours. The jury asked, "Is manslaughter an option for a guilty charge or is murder the only option?"[15]

The Court of Appeals stated: "no error occurs when shackles were not seen by the jury and '[t]he trial judge took precautions to minimize any prejudice the restraints might have caused throughout the trial.'" *State v. Kelly*, Op. No. 2025-UP-247 at 4 (quoting *State Tucker*, 320 S.C. 206, 209–10, 464 S.E.2d 105, 107 (1995)). App. 76. It concluded: "the trial court placed picnic screens 'and whatnot' around the table where Appellant was seated during the trial to ensure the shackles were not visible to the jury. Thus, the trial court did not err in balancing the need to restrain Appellant against the need to minimize any potential prejudice from the sight of the shackles." *State v. Kelly,* Op. No. 2025-UP-247 at 4. App. 76. The Court of Appeals further held,

> The prejudice arising from shackling is identical to the prejudice that stems from forcing a defendant to be tried in prison attire . . . it is undisputed that Appellant voluntarily chose to wear the clothing issued by the jail throughout his trial. Given Appellant's

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14 R. 193, l. 20 – 194, l. 25.

15 R. 682, l. 21 – 685, l. 14.

> refusal to change clothes, we cannot see how he could possibly have been prejudiced by the fact that the jury may have heard Appellant's restraints but not seen them. *See Estelle*, 425 U.S. at 507 ("No prejudice can result from seeing that which is already known." (quoting *United States ex rel Stahl v. Henderson*, 472 F.2d 556, 557 (5th Cir. 1973))); *see also id.* at 508 ("A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." . . .

State v. Kelly, Op. No. 2025-UP-247 at 4 – 5. App. 76 – 77.

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). "[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 use of physical restraints visible to the jury [are prohibited] absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id.*, 544 U.S. at 629. "[A] judge [may], in the exercise of his or her discretion, [] take account of special circumstances, including security concerns, that may call for shackling . . 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. "[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." *State v. Heyward*, 441 S.C. 484, 493, 895 S.E.2d 658, 663 (2023).

Although the shackles were not visible to the jury, they were audible. While the jury can see, it can also hear. *See generally Carruthers v. Atl. & Yadkin Ry. Co.*, 9 S.E.2d 498, 500 (N.C.

1940) (perception of facts depends on sensory faculties, typically sight or hearing); *Pierson v. Frederickson*, 245 A.2d 524, 526 (N.J. App. Div. 1968) ("Visual perception is not the exclusive sensory means of gaining personal knowledge; it can also be attained by means of auditory perception.").

Petitioner 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. Petitioner had not attempted to assault anyone or intimidate the jury. He had not committed threats or misconduct that would justify the shackles. Instead, he 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, Petitioner's pro se verbal disruptions were no longer a problem since he was represented by a lawyer. Petitioner 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]hen 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." *State v. Heyward*, 441 S.C. at 505, 895 S.E.2d at 669 (citations and internal quotation marks omitted). In *Heyward*, this Court found "the State did that in this case by conclusively proving Heyward's guilt with other overwhelming evidence such that no other rational conclusion could be reached except that he is guilty of each crime." *Id.*, 441 S.C. at 506, 895 S.E.2d at 670. In this case, the jury deliberated for close to four hours and asked if it could convict Petitioner of manslaughter. R. 682, l. 21 – 685, l. 14.

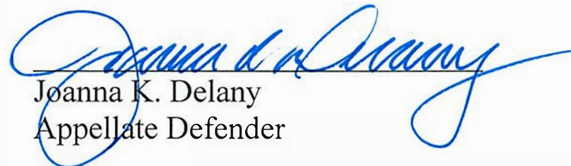
There was no overwhelming evidence of guilt. The State did not show Petitioner was not prejudiced from the audible shackles.

The shackles unfairly went to malice, which was in issue in this case, because they portrayed Petitioner as dangerous in a way that a jail uniform did not. *See Estelle v. Williams*, 425 U.S. 501, 508 (1976) ("[I]nstances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury."). Petitioner was prejudiced. *Deck v. Missouri*, 544 U.S. at 635.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully Submitted,



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of October, 2025.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 25-UP-247 (S.C. Ct. App. Filed July 16, 2025)

Lower Court Case No. 2020-GS-23-06536

THE STATE,

RESPONDENT,

V.

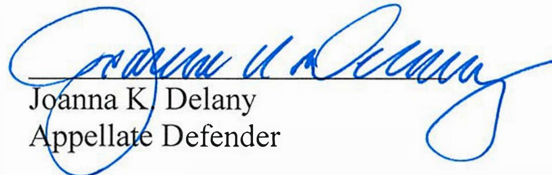
RAY KELLY,

PETITIONER

APPELLATE CASE NO. 2025-001854

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for writ of certiorari to the Court of Appeals and appendix 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); and the South Carolina Court of Appeals; and on Ray L. Kelly, #389127, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 3rd day of October, 2025.



Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330
ATTORNEY FOR PETITIONER