

ORIGINAL

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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THE STATE

S.C. Supreme Court

PETITIONER,

V.

BENTLEY COLLINS

RESPONDENT.

Appellate Case No. 2012-211266

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Appeal from Dillon County

Paul M. Burch, Circuit Court Judge

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Opinion No. 4941

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PETITION FOR REHEARING

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On August 20, 2014, this Court, in a divided 2-2-1 opinion, reversed the Court of Appeals' opinion in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012). In 2012, a unanimous three-judge panel of the Court of Appeals reversed Respondent's convictions based upon the trial court's erroneous admission of unfairly prejudicial and non-probative graphic photographs. However, on August 20, 2014, in a sharply divided opinion, this Court reversed the well-reasoned opinion of the Court of Appeals. Only two justices of this Court agreed that the introduction of the photographs was not an error. Thus, three justices found the introduction of the photographs was

erroneous. Two of those justices found the error harmless, however. The fifth justice agreed with the Court of Appeals that “any minimal probative value of the admitted photographs was substantial outweighed by the danger of unfair prejudice.” Respondent respectfully requests this Court rehear the matter pursuant to Rule 221, SCACR, based upon the following points overlooked and/or misapprehended by this Court. Primarily, rehearing would allow this Court to (1) resolve the conflict among the three opinions issued, (2) align the opinion with the record concerning key points, (3) correct the misperception that the Court of Appeals’ opinion was based upon an emotional reaction, (4) address whether harmless error applies to the analysis of Rule 403, SCRE, which already contains a prejudice determination, and (5) give guidance to the Bench and the Bar regarding the introduction of unfairly prejudicial photographs, which bear little to no probative value.

Turning first to the opinion’s reliance upon the need to introduce the photographs to rebut the defense’s cross-examination of the pathologist, a review of the record reveals, the defense did not contest the findings of the pathologist at all. Specifically, the opinion states that “the nature and extent of the boy’s physical injuries as described by the pathologist were in contention by the defense” based upon defense counsel questioning the pathologist about certain matters. A review of the record reveals the nature and extent of the injuries were not challenged by the defense at all. The cross-examination pointed out that the pathologist could not say which dog(s) caused the death, that forensic odontologist could have examined the bitemarks for comparison to the dogs’ teeth, and that autopsy of a dog is possible. The cross-examination lasted a mere six pages in the record, and simply did not challenge the pathologist’s findings at all. Instead, the cross-examination went to Respondent’s defense – that the state could not prove that his dogs caused the death. There was no

challenge to the cause of death or the injuries sustained. Thus, this point relied upon in this Court's opinion is not supported by a review of the record.

The opinion also faults the Court of Appeals for an emotional reaction to the evidence. Specifically, the opinion states that “[t]he Court of Appeals’s obvious revulsion for the evidence, while certainly understandable, permeated its legal analysis.” Further, the opinion says “the appellate court should not have invaded the trial court’s discretion in admitting this crucial evidence based on its emotional reaction the subject matter presented.” The opinion of a unanimous panel of distinguished jurists on the Court of Appeals reveals a thoughtful, analytical, and unemotional review of the issue presented. The Court of Appeals recognized the disturbing nature of the photographs, which was required in order to determine if the photographs were unfairly prejudicial. However, the Court of Appeals did not issue its opinion based upon an emotional reaction. A review of its opinion reveals quite the opposite – a careful consideration of the probative value of the photographs weighed against the danger of unfair prejudice. The Court of Appeals engaged in the correct analysis as required by the Rules of Evidence. Specifically, Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Photographs are unfairly prejudicial when they have a “tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

In the instant case, the Court of Appeals reviewed the admissibility of the photographs using a four-step analysis. First, the Court examined the probative value of the photographs, including whether the photographs corroborated testimony. Next, the Court evaluated the danger of unfair prejudice resulting from the introduction of the photographs. Third, the Court balanced the

probative value and unfair prejudice. Fourth, the Court reviewed the trial court's decision for an abuse of discretion.

The Court of Appeals correctly held the state elicited ample testimony from the forensic pathologist concerning the victim's injuries and the cause of death prior to the introduction of the photographs. As explained by the Court of Appeals, the state produced the testimony of the pathologist and introduced the autopsy report to explain the injuries. Thus, "the photos added very little to the jury's ability to understand the pathologist's testimony on this point." App. 3. The nature of the injuries suffered by the victim did not require the jury to understand human anatomy because the skin and tissue was eaten away. The pathologist described the injuries in plain English, using terms such as face, nose, jaw, shoulder, ear, and eye. Although the pathologist testified concerning a transected jugular vein on the left side, which contributed to the child's death, the pathologist admitted that injury was "very hard to see" in the photograph used to illustrate this point. Thus, the photographs were not probative of the only testimony of the pathologist that the jury may have required assistance in understanding – laceration of the jugular vein. The testimony of the pathologist simply negated the necessity of the photographs.

"The danger of unfair prejudice of the admitted photos is extreme." App. 6. The Court of Appeals explained that looking at each of the seven color photographs of the ten-year old boy's partially devoured corpse on the autopsy table was "difficult," but the "combined effect of all seven is disturbing." Three photographs were close-up of the boy's face showing the exposed skull and jaw bone. Two of the close-up photographs showed the exposed arm, shoulder, and ribs where the flesh had been eaten away starting in the middle of the chest, across the shoulders and to his elbows. The Court of Appeals explained the photographs of the face were "chilling." App. 6.

Next, the Court of Appeals weighed the probative value of the photographs against the prejudicial effect. The Court properly recognized that the photographs prompted “an intense emotional response.” App. 6. According to the Court, the “photos evoke sympathy for the boy and also for his mother for what she must have endured when she saw her son in this condition.” App. 6. Thus, the photographs had an undue tendency to suggest a decision by the jury on an improper basis – emotion. The gruesome nature of the photographs had “an overwhelming capacity” to suggest the jury find Respondent guilty on the basis of sympathy for the boy and his mother. As a result, the photographs’ prejudicial effect outweighed their minimal probative value.

Finally, the Court of Appeals examined the trial court’s decision for an abuse of discretion. The Court of Appeals explained “[t]he trial judge must balance the prejudicial effect of graphic photographs against their probative value.” This Court’s opinion states that “the trial court did thoroughly consider the arguments of both the state and the defense, and it examined each photo while also conducting an examination of the forensic pathologist who took the photographs before making its decision.” The record clearly shows the trial court failed to do just this, as the Court of Appeals held. During the in-camera hearing concerning the photographs, the trial judge abdicated his duty to exercise discretion to the pathologist, and the state admitted this in its brief. BOP 14. This Court then suggests that because Respondent did not object to the complete abdication of duty that Respondent has somehow waived any request for relief. Respondent objected clearly and unequivocally to the admission of the photographs. That is all that was required of Respondent.

This Court’s criticism that the Court of Appeals’ decision, which was rendered by a panel of dispassionate jurists with extensive judicial experience, was based on emotion runs afoul of this Court’s determination that the jurors viewing the same photographs would not render a decision based on emotion, which would be an improper basis. One can hardly imagine a scenario in which

photographs are so gruesome and horrific that a panel of judges would make a decision based on emotion, but a jury of twelve lay people viewing the same photographs would not be moved to make an emotional decision. The opinion of the Court of Appeals was not based upon an emotional reaction; instead, the opinion correctly applied the law and found the photographs were so unfairly prejudicial that a jury would be moved to make an emotional decision. The record simply does not support this Court's statement that the Court of Appeals' decision was based upon emotion. In fact, the only support for this suggestion was from the state's brief and certiorari petition, not the record.

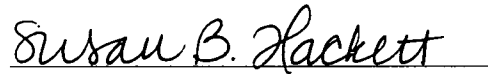
Four justices applied harmless error to the erroneous admission of the unfairly prejudicial photographs. In doing so, this Court required Respondent to prove prejudice twice. Surely, evidence deemed so unfairly prejudicial when weighed against its probative value as requiring exclusion cannot be considered harmless. Rule 403 of the South Carolina Rules of Evidence is itself a prejudice analysis. Harmless error simply has no place in the application of Rule 403, SCRE. Additionally, the evidence against Respondent was not overwhelming, as stated by this Court. There was little evidence to support the prosecution's theory that Respondent's dogs caused the death. Due to the paucity of evidence, the prosecutor resorted to playing on the jurors' emotions by displaying the photographs.

Finally, and most importantly, the introduction of the photographs at issue violated Respondent's federal constitutional right to due process of law. Due process requires "fundamental fairness" that is "essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236 (1941); see also Spencer v. Texas, 385 U.S. 554, 563-564 (1967). When evidence is introduced against a defendant that "is so extremely unfair that its admission violates fundamental conceptions of justice," the defendant's due process rights have been violated. Dowling v. United States, 493 U.S. 342, 352 (1990). The photographs introduced at the trial, and held erroneously admitted by

four justices of this Court, were so horrific and extremely unfair as to have violated Respondent's federal constitutional right to due process of law.

Respectfully, Respondent requests this Court rehearing the matter to address the aforementioned points misapprehended and/or overlooked by this Court in its opinion issued on August 20, 2014.

Respectfully submitted,

  
Susan B. Hackett  
Appellate Defender

This 4th day of September, 2014.

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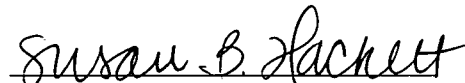
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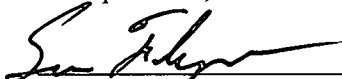
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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Bentley Collins at, 1590 Fort Harrod Way, Crab Orchard, KY 40419, this 4<sup>th</sup> day of September, 2014.

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 4th day  
of September, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.