STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

J. Cordell Maddox, Jr., Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Unpublished Opinion No. 2015-UP-256 (S.C. Ct. App. filed May 20, 2015)

THE STATE, RESPONDENT,

vs.

JOHN FITZGERALD KENNEDY, PETITIONER.

Appellate Case No. 2015-001534

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Whether the Court of Appeals erred in ruling the introduction of a "mug shot" was not reversible error?

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

Whether certiorari is appropriate where the appellate court properly applied the law in affirming Petitioner's conviction where the trial court erred in admitting a photo lineup but where no undue prejudice resulted from the admission because the photo was not a traditional "mug shot," because it was unclear to the jury whether the photo was from a prior arrest or a driver's license, and because there was substantial evidence, both direct and circumstantial, that Petitioner committed the murder.

RESPONDENT'S STATEMENT OF THE CASE

An Anderson County Grand Jury indicted Petitioner, John Fitzgerald Kennedy, in September 2012 for the murder of Claud Schaffer Scott. (R. p. 469). On December 2, 2013, Petitioner's case was called to trial before the Honorable J. Cordell Maddox. (R. p. 1). Petitioner was represented by Andrew Potter during the four-day trial. (R. p. 1). Assistant Solicitor Catherine T. Huey represented the State. (R. p. 1). On December 5, 2013, the jury returned a verdict of guilty. (R. p. 433, lines 5–13). Thereafter, Judge Maddox sentenced Petitioner to thirty (30) years imprisonment. (R. p. 439, lines 14–22). Petitioner appealed.

On November 20, 2014, appellate counsel filed a Final Brief of Appellant, addressing "[w]hether the trial court erred in allowing a photographic lineup into evidence that contained mug shots because it let the jury know appellant had a prior record and deprived him of a fair trial?" (Final Br. of Appellant, p. 3).

The State filed its final brief in response on December 8, 2014.

On May 20, 2015, the Court of Appeals issued an unpublished opinion affirming the ruling and conviction. (App. pp. 1–2). Petitioner filed a petition for rehearing on June 1, 2015. (App. pp. 3–5). The Court of Appeals denied the petition on June 24, 2015. (App. p. 6).

On July 17, 2015, Petitioner filed a Petition for Writ of Certiorari in this Court asking "[w]hether the Court of Appeals erred in ruling that the introduction of a 'mug shot' was not reversible error?" (Cert. Petition, p. 3).

This return follows.

RESPONDENT'S STATEMENT OF FACTS

Victim Identifies Petitioner as His Attacker

On the evening of Friday, March 30, 2012, Kimberly King went to check on her seventy-six-year-old neighbor, Claud Schaffer Scott (Victim), who had been very sick when King was at his home earlier that day. (R. p. 145, line 20–p. 151, line 15). When she arrived at Victim's home that evening, King found that Victim's front door was closed and locked, which was unusual as the door was normally open wide or, if it was closed, unlocked. (R. p. 151, line 16–p. 152, line 11). King began knocking on Victim's door. (R. p. 152, lines 8–11). Petitioner, who had been living in a camper behind Victim's home for a week or two, came from the back of the house and told King that Victim was asleep and did not want to be bothered. (R. p. 147, line 23–p. 148, line 22; R. p. 152, lines 12–p. 153, line 3). King noticed that Petitioner "was real sweaty and just looked weird." (R. p. 152, line 19). King told Petitioner that she was "going in anyway" and asked Petitioner if the back door was locked. (R. p. 153, lines 4–7). According to King, Petitioner responded, "no" but then "he fl[ew] around to the back" and locked the back door. (R. p. 153, lines 4–13). Petitioner then got into a blue car that belonged to Victim and asked King to go with him to the store, but King refused. (R. p. 153, line 14–p. 154, line 9). Petitioner drove off. (R. p. 153, lines 14–23).

King went back around to the front of Victim's house and started beating on the door. (R. p. 153, line 14–p. 154, line 22). King heard Victim say, "['G]o away. I don't want to be bothered now. Go away.[']" (R. p. 154, lines 22–23). But King told Victim to open the door and identified herself to him. (R. p. 154, lines 20–25). Victim then opened the door and immediately collapsed in the doorway. (R. p. 154, line 25–p. 155, line 22). King could tell that Victim had been beaten very badly, and she called 9-1-1.

(R. p. 154, line 25–p. 157, line 5). King told the 9-1-1 dispatcher that Petitioner had just left Victim's trailer—she specifically identified him as "John F. Kennedy" to the 9-1-1 dispatcher. (R. p. 157, lines 17–20; State's Ex. 4-A).

Another neighbor, David Evans, came over to assist King before emergency personnel arrived. (R. p. 157, line 21–p. 159, line 5; R. p. 172, line 22–p. 175, line 8). Evans testified that he knelt down beside Victim and asked what happened, and Victim responded, "[']John, the black guy, hit me.[']" (R. p. 175, line 6–p. 178, line 20).

Paramedics arrived, treated Victim's wounds as best they could, and then transported Victim to the hospital. (R. p. 195, line 7–p. 199, line 3). Multiple police officers responded to the hospital, including Brandon Dunn, who overheard Victim tell emergency room staff that John hurt him. (R. p. 200, line 7–p. 204, line 9). Detective McKindra Bearden spoke to Victim at the hospital. (R. p. 205, line 24–p. 207, line 13). Bearden testified, "I said, do you know who done it? And he said, Josh. And I said, Josh? And he goes, no, John. I had misunderstood him, but he did correct me. He said John done it." (R. p. 208, lines 3–6). Investigator Brent Simpson also met with Victim and took Victim's statement. (R. p. 327, line 23–p. 329, line 20). Simpson recorded the entire statement using his cell phone. (R. p. 329, line 21–p. 332, line 3; State's Ex. 11). In the recording, Victim identifies "John," who lived in Victim's camper, as the man who beat him. (State's Ex. 11). Victim indicates that John hit him with a skillet. (State's Ex. 11). After giving his statement to Simpson, Victim went unconscious and never regained consciousness. (R. p. 331, line 25–p. 332, line 3). Victim passed away from his injuries around 7:20 a.m. on March 31, 2012. (R. p. 332, lines 18–20).

The Investigation Into Victim's Death

As part of their investigation, the police developed a timeline of both Victim's and Petitioner's actions on March 30, 2012. The State presented the details of those timelines at trial. (R. p. 345, line 13–p. 346, line 5).

Police learned that Victim sold a van to Margaret Conwell on March 30, 2012, around lunchtime. (R. p. 338, line 18–p. 340, line 10). Conwell wrote Victim a $1500 check in exchange for the van. (R. p. 340, lines 3–24). Police then obtained surveillance stills from the bank where Victim cashed the check. (R. p. 340, line 17–p. 341, line 3). Those stills showed Victim and Petitioner in the parking lot of People's Bank around 1:09 p.m. (R. p. 341, lines 7–20; R. p. 456–57). The two then entered the bank, and Petitioner sat in the lobby while Victim cashed the check. (R. p. 341, line 21–p. 342, line 20; R. pp. 458–63). Petitioner and Victim left the bank around 1:15 p.m. (R. p. 342, line 21–p. 343, line 13; R. pp. 464–66). Police never recovered the $1500 that Victim received from the bank that day. (R. p. 343, lines 14–18). They only found spare change at Victim's home. (R. p. 343, lines 19–21).

As recited in detail above, on the evening of March 30, 2012, King watched Petitioner drive away from Victim's home in Victim's blue car shortly before King discovered that Victim had been badly beaten. King called 9-1-1 at 5:51 p.m. on March 30, 2012. (R. p. 337, line 22–p. 338, line 14; State's Ex. 4-A). Surveillance video from a Bi-Lo parking lot about eight miles from Victim's home shows Victim's blue Mercury Mystique enter the parking lot at about 6:04 p.m. and a black male park the car and then run away on foot. (R. p. 333, line 7–p. 337, line 14; R. pp. 467–68). According to

Investigator Simpson, it takes about fifteen or sixteen minutes to drive from Victim's home to that Bi-Lo. (R. p. 337, lines 10–14).

Petitioner turned himself in on April 1, 2012. (R. p. 346, lines 12–13). At that time, police collected the clothing Petitioner was wearing and sent it to the lab at the South Carolina Law Enforcement Division (SLED) for testing. (R. p. 346, line 18–p. 347, line 10). SLED forensic scientist Catherine Leisy analyzed two cuttings from Petitioner's shorts and found the presence of blood. (R. p. 311, lines 17–23). She also developed DNA profiles from the cuttings and found that the DNA matched that of Victim. (R. p. 311, line 17–p. 312, line 13). According to Leisy, there was a one in two hundred and fifty quadrillion chance of selecting an individual (unrelated to Victim) with a DNA profile matching the DNA found on the shorts. (R. p. 311, line 11–p. 312, line 13). Leisy also analyzed swabs from a skillet found at the scene. (R. p. 310, line 8–p. 311, line 16). Those swabs tested positive for blood, and the DNA matched that of Victim. (R. p. 310, line 8–p. 311, line 16).

ARGUMENT

The Court of Appeals did not err in rejecting Petitioner's claim that the trial court committed reversible error in admitting Petitioner's mug shot where Petitioner was not prejudiced by the admission of the photo.

Court of Appeals Opinion

The Court of Appeals found, by *per curiam*, unpublished opinion, that the trial judge did not err in denying Petitioner's motion for a directed verdict. (App. pp. 1–2). The Court of Appeals affirmed the trial court based on the following authorities: *State McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 609 (Ct. App. 2012) ("In criminal cases, the appellate court sits to review errors of law only."); *State v. Traylor*, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004) ("The introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the [S]tate has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication."); *id.* at 84 n.12, 600 S.E.2d at 528 n.12 ("[T]he rationale for this holding is that such photos are prejudicial because they imply a defendant's prior bad acts."); *id.* at 84, 600 S.E.2d at 528 (explaining that although our supreme court has "strongly admonish[ed] the [S]tate against utilization" of a defendant's mug shot at trial, when the introduction of a defendant's mug shot does not prejudice the defendant, the error is not reversible); *State v. Stephens*, 398 S.C. 314, 322, 728 S.E.2d 68, 72 (Ct. App. 2012) (affirming the trial court's admission of photos that showed the defendant's "head and neck against a blank background," contained "no identifying marks as to date, location, agency, or purpose of the photograph," and showed the defendant "wearing street clothes," finding "[t]he photographs . . . could have come from driver's licenses, employee identification badges, or other sources").

Considerations Governing Review

A writ of certiorari is not a matter of right but of judicial discretion. Rule 242(b), SCACR. The following, while not binding, weigh in favor of granting the writ:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR. None of the above are true for this case, and, as such, the writ of certiorari should not be granted.

Relevant Facts

At trial Kimberly King testified that she encountered Petitioner coming from the back of Victim's home immediately before finding Victim severely beaten. (R. p. 150, line 12–p. 155, line 2). King testified that Petitioner had been living in a camper behind Victim's home for one or two weeks. (R. p. 148, lines 1–22). According to King, "I didn't really know him until he really like moved in. I didn't know him, know him. I seen him around a few times in the neighborhood before he moved over there. But the most I've ever seen him is five or six times. Maybe seven times." (R. p. 148, lines 11–15). During her testimony, King identified Petitioner as John F. Kennedy, whom she had seen at Victim's home on March 30, 2012. (R. p. 148, line 23–p. 154, line 16). King also testified that when she met with Investigator Bearden later that evening, she picked

Petitioner out of a photo display as the man she had seen leaving Victim's home. (R. p. 159, line 19–p. 161, line 16). King also signed an affidavit to that effect at that time. (R. p. 160, line 25–p. 161, line 16).

The State presented the photo display to the jury through Bearden's testimony. (R. p. 208, line 21–p. 216, line 4; R. p. 455). Bearden testified to the following:

> This is the photo lineup, the original that I put together and printed that evening and the Affidavit of Photo Identification that I printed that evening at the same time and also filled out on the scene with the witness.
>
> Q. And so when you were putting together the display, what kind of characteristics are you looking for?
>
> A. We have a program that's called Mug Web. And you put in a suspect's name, and you can pick a picture out of a lineup if they've been arrested before and in the system. When you get that picture up, it'll pull up similar—you pull up similar pictures. You go through and choose. What I went through to choose—
>
> Q. And—I'm sorry. Go ahead. I apologize.
>
> A. What I went through to choose would be people with similar coloring as far as skin characteristics, length of hair, facial hair, anything like that, the same age. You want somebody within the same parameter. You don't want exactly the same, but you want similar.
>
> Q. Okay. Now Ms. Bearden, you can also pull photos from driver's licenses too; isn't that correct?
>
> A. You can, yes.
>
> Q. Now, in terms of what specific characteristics in this case were you looking for in terms of physical characteristics?
>
> A. I was looking for a black male, middle aged, thin to medium build, approximately—I've already said medium complexion. Short hair, some facial hair that looked like the picture that we had of Mr. Kennedy on file.

(R. p. 209, line 16–p. 210, line 19). Bearden then went on to describe the procedure she went through in showing the photo lineup to King and in having King sign the affidavit. (R. p. 210, line 20–p. 212, line 18).

When the State sought to have the photo display and affidavit published to the jury, defense counsel objected. (R. p. 212, line 19–p. 213, line 2; R. pp. 454–55). The following discussion then took place *in camera*:

MR. POTTER: Judge, the main purpose of this objection is the item itself. It's a photo array, and it's clearly not taken from driver's license photographs. These are all mug shots and which my client is one of them. And I think it's unduly prejudicial. At the very least under 403, prejudicial towards my guy because what's going to happen is they're going to take that back there and look at it, and they're going to see mug shots. They're not going to see driver's license photos.

THE COURT: Well, how was this—I thought it was from driver's license photo?

MS. HUEY: It could have been. This was from mug shots in this particular case.

THE COURT: Let me look at it.

MS. HUEY: I think Ms. Bearden has it. I mean, all you can see is the face, Your Honor.

THE COURT: All right. You're protected on the record. I'll allow that in. I mean, I—you're assuming they know it's a mug shot. And you and I may know it, but—

MR. POTTER: Well, I think it's fair to say that's not a photograph from the D.M.V. They're not in a collared shirt or smiling for that matter or anything like that.

(R. p. 213, line 6–p. 214, line 4). Ultimately, the trial court found the photos to be admissible. (R. p. 214, lines 11–12).

Upon the jury's return to the court room, defense counsel immediately asked for a bench conference. (R. p. 214, lines 13–18). Judge Maddox and counsel then conferred off the record. (R. p. 214, lines 20–21). Judge Maddox announced that they had taken up an objection off the record and that they would preserve the objection during a break. (R. p. 214, lines 22–25). The trial court then allowed the State to publish the photo display and affidavit to the jury. (R. p. 215, line 1–p. 216, line 4).

At the next break, the following discussion took place:

THE COURT: Okay, Let's go back to the objection and go ahead and document that. We had an off-the-record conversation in which the objection was made. And I'll be happy to hear from you.

MR. POTTER: Judge, the testimony was she took the photographs from booking photos from the Sheriff's department. And that's the reason for the objection of it being admitted because it implies that my client has been arrested before and that there's a prior record with the court—excuse me—with law enforcement.

In addition to that, the photograph has Anderson County Sheriff's Department written—or Sheriff's office written on top of it. It can easily be inferred these are booking photographs. These are not photographs taken from the D.M.V.

THE COURT: It says it on the pictures?

MR. POTTER: It says it right above the pictures.

MS. HUEY: Just printed from her computer, Your Honor.

THE COURT: Okay.

MR. POTTER: And in big bold letters, Anderson County Sheriff's Office is written on there. And again, Judge, I think it's highly prejudicial that those are photographs that clearly are booking shots.

THE COURT: Okay. All right. Well—and you're protected for the record. I think it's admissible. It would probably be better if it came from driver's licenses, but I don't think that makes it inadmissible.

(R. p. 222, line 2–p. 223, line 6).

Defense counsel renewed his objection to the photo array at the end of the State's case, but the trial court specifically found the photo array was more probative than prejudicial. (R. p. 370, line 15–p. 375, line 23).

Discussion

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). 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. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

The Court of Appeals, in affirming Petitioner's conviction, cited this Court's opinion in *State v. Traylor*, 360 S.C. 74, 600 S.E.2d 523 (2004), which states

> The introduction of a "mug-shot" is reversible error unless: (1) the state had a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.

360 S.C. at 84, 600 S.E.2d at 528 (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986); *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v. Denson*, 269 S.C. 407, 237 S.E.2d 761 (1977)). The Court of Appeals further noted that this Court has cautioned that the use of mug shot photos should be avoided, but where the erroneous admission of such a photo did not result in prejudice, the Court has affirmed the conviction of the defendant. *Id.* at 84–85, 600 S.E.2d at 528.

No Demonstrable Need to Introduce Photo Lineup

Below, Respondent conceded that the State did not have a demonstrable need to introduce the photo lineup. Though the State was not asked for and did not offer the reason for seeking to have the photo lineup admitted, the circumstances under which the photo lineup was presented in this case are substantially similar to the circumstances of *Tate* where this Court found the prosecution had no demonstrable need to introduce a photo lineup. 288 S.C. at 106, 341 S.E.2d at 381 ("The victim positively identified appellant in court, and there was testimony by Detective Parris that she had picked appellant out of a photographic lineup. Given this competent evidence proving identity, we fail to see the demonstrable need to introduce the 'mug shot.'"). Respondent again contends there was no demonstrable need to admit the photo lineup.

No Prejudice to Petitioner

The Court of Appeals' citation to particular portions of the *Traylor* opinion suggests that the court found Petitioner was not prejudiced by the admission of his mug shot. (App. p. 2 (citing *Traylor*, 360 S.C. at 84, 600 S.E.2d at 528 (explaining that although our supreme court has "strongly admonish[ed] the [S]tate against utilization" of a defendant's mug shot at trial, when the introduction of a defendant's mug shot does not prejudice the defendant, the error is not reversible))). Respondent agrees with that conclusion because, to the jury's knowledge, the photo could have been a driver's license photo rather than an arrest photo. Moreover, the State presented overwhelming evidence of Petitioner's guilt.

Photograph Did Not Imply a Criminal Record

Respondent submits that the photo used in the lineup introduced at trial did not imply that Petitioner had a criminal record. Though Petitioner claims that it was obvious from Bearden's testimony that all of the photos in the lineup were mug shots, he does not claim that the photo itself looked like a mug shot. And Respondent submits that the mug shot used in the photo lineup is similar to those that South Carolina courts have found acceptable in other cases—the photo is only a frontal view of each subject's head and shoulders; there is a blank background behind each subject in the photos; and the photos have been cropped so that no placards are visible. *See State v. Robinson*, 274 S.C. 198, 200–01, 262 S.E.2d 729, 730 (1980) (finding nothing to imply a prior criminal record and noting that the jury could assume the photo was a result of the investigation for murder where a photo lineup showed three different poses of each subject and blacked out written material on the face of each photo); *State v. Denson*, 269 S.C. 407, 412–13, 237 S.E.2d 761, 764 (1977) (finding photos did not imply a prior criminal record where "[t]he photographs were not the juxtaposed full face and profile photographic display normally associated with 'mug shot.' Neither did the appearance of the words 'Richland County' on one of the photographs inform the jury that appellant had a prior criminal record"); *State v. Ford*, 334 S.C. 444, 450 n.3, 513 S.E.2d 385, 388 n.3 (Ct. App. 1999) (finding a mug shot admissible where "[o]nly the heads and necks of the individuals in the lineup photographs were visible in the photo lineup. The remainder of each photograph was cut away. No identifying clothing or placards were visible in the lineup."); *cf. Tate*, 288 S.C. at 105, 341 S.E.2d at 380 (finding a photo "clearly" implied a prior record where "[t]he photographs in question were typical police photographs, taken when a person has been

arrested, depicting the appellant in two classic poses; a standing close-up facial view and a standing close-up side view. In each picture a small board with the date 11-20-82 and the words 'SPTBG. CO. SHERIFF' is hanging around appellant's neck.").[1] As counsel for the State noted and the trial court acknowledged, the photos used in the lineup could have been driver's license photos. Thus, the lineup photo itself did not imply that Petitioner had a prior criminal record.

Introduction of Photograph Did Not Draw Attention to the Source or Implication of the Photograph

Respondent disagrees with Petitioner's claim that Bearden's testimony made it obvious that the photo of Petitioner used in the lineup was a mug shot. When Bearden explained how she made the photo lineup, she stated that she used a program called Mug Web to obtain a photo of Petitioner and to find photos of men with similar characteristics. (R. p. 209, line 21–p. 210, line 19). Bearden further testified that the program allows someone to pull pictures of those who have previously been arrested, but she also acknowledged that the program allows someone to pull from driver's license photos. (R. p. 209, line 21–p. 210, line 12). While describing her process in creating the lineup in Petitioner's case, she stated she looked for photos of men with similar characteristics to the photo of Petitioner that they had "on file." (R. p. 210, lines 16–19).

Respondent submits that this testimony did not draw attention to the source or implication of the photo—as far as the jury was concerned, the photos in the lineup could

[1] In its *per curiam* opinion, the Court of Appeals cited *State v. Stephens*, 398 S.C. 314, 322, 728 S.E.2d 68, 72 (Ct. App. 2012), which affirmed a trial court's admission of a defendant's mug shot because "[t]he photographs at issue . . . could have come from driver's licenses, employee identification badges, or other sources" where the photos showed the defendant's "head and neck against a blank background[,]" contained "no identifying marks as to date, location, agency, or purpose of the photograph[,]" and showed the defendant "wearing street clothes."

have been from arrests or from driver's licenses (or some combination of both). Even in a case where the jury was told that lineup photos "came from the files of the Richland County Sheriff's Department and the Columbia Police Department," this Court found "no intimation in the record that the admission of the photographs in any way focused the jury's attention on the source of the photos." *Denson*, 269 S.C. at 413, 237 S.E.2d at 764. Respondent submits that, in this case, the photo lineup was not introduced in a manner as to draw attention to the source of the photos. The court of appeals apparently agreed that no prejudice resulted from the admission of the photo lineup containing Petitioner's mug shot.[2]

Overwhelming Evidence of Guilt

Even were this Court to disagree with the conclusion by the Court of Appeals that the admission of the mug shot did not prejudice Petitioner, Respondent submits that such admission was rendered harmless where there was overwhelming evidence of guilt.

In this case, the State presented overwhelming evidence of Petitioner's guilt. The State presented evidence at trial that Victim was brutally beaten on March 30, 2012, and that the injuries he sustained in the beating resulted in his death. The State presented the following evidence to prove that Petitioner committed the murder:

- Petitioner was with Victim earlier in the day when Victim cashed a check for $1500;

[2] Even if Bearden's statement regarding her access to arrest photos through Mug Web was found to be prejudicial, Respondent believes that Bearden's additional testimony cured any prejudice. Specifically, counsel for the State had Bearden clarify that Mug Web allows someone to pull from driver's license photos, too. Thus, any prejudicial effect that resulted when Bearden referenced arrest photos was neutralized by that clarification. *Cf. Tate*, 288 S.C. at 106, 341 S.E.2d at 381 ("The prejudicial effect of these photographs outweighs their probative value and the prejudice was neither cured nor rendered harmless by other events which occurred at trial.").

- An eyewitness saw Petitioner at Victim's home (the crime scene) immediately before finding Victim severely beaten inside his home;
- The same eyewitness testified that Petitioner told her Victim was sleeping and then locked the back door to Victim's home, thereby preventing her from entering Victim's home;
- Petitioner tried to get the eyewitness to leave Victim's home before he fled the scene in Victim's car;
- Petitioner abandoned Victim's car in a parking lot eight miles away from Victim's home and ran away on foot;
- Victim told multiple individuals that Petitioner beat him;
- Victim told police he was beaten with a skillet and forensic tests confirmed the presence of Victim's blood on the skillet; and
- Forensic tests confirmed that Victim's DNA was found on Petitioner's shorts.

Respondent would further note that the State did not refer to the photo lineup again after its admission. Nor did the State reference the lineup in closing arguments. In light of the overwhelming evidence of Petitioner's guilt, any prejudice that resulted from any vague suggestion that Petitioner had a prior record was rendered harmless at trial.

For all of the above reasons, Petitioner's argument that the Court of Appeals erred in affirming Petitioner's conviction and sentence must be rejected. This Court should not grant the petition for writ of certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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August 17, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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THE STATE, RESPONDENT,

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JOHN FITZGERALD KENNEDY, PETITIONER.

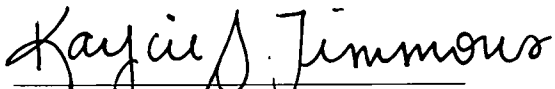
Appellate Case No. 2015-001534

PROOF OF SERVICE

I, Kaycie S. Timmons, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Pachak, at:

SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

This seventeenth day of August, 2015.



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